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GROUP 290

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	Group Art Unit: 291
	)	
ANTHONY MAGLICA	)	Examiner: M. Tung
	)	
Serial No.: 07/411,576	)	
	)	
Filed: September 22, 1989	)	
	)	
For: CANDLE MODE FLASHLIGHT	)	

#### STATEMENT RE SECONDARY CONSIDERATIONS

Honorable Commissioner of Patents  
and Trademarks  
Washington, D. C. 20231

Sir:

The subject matter of the present application, known in the trade as the "Mini-Maglite" or the "Mini-Mag", has become a well recognized and highly successful product. Several indicia of that recognition and of that success are available and are presented here.

Of greatest significance is the magnitude of sales of these products. To date, over 6 million units have been sold.

#### Sales Associated With Aesthetics

Mr. Don Keller, who was familiar with the marketing aspects of the Mini-Maglite design, testified as follows:

Q. And when the man (sic Mini) Maglite was introduced, there was nothing on the market like it, correct?

A. That's correct.

Q. And the Mini-Maglite was distinctive, wasn't it?

A. Yes, yes.

Q. And you believed the Mini-Maglite would appear beautiful to customers when they saw it, correct?

A. Yes.

Q. And the good looks of the Mini-Maglite helped to sell it?

A. Yes, that's correct.

Q. And the Mini Maglite was a phenomenal success, correct?

A. Yes.

Q. And the appearance of the Mini-Maglite was one of the reasons for that success, correct?

A. Yes.

Mr. Keller's testimony is attached hereto as Attachment A.

#### Industry Recognition of Design

The design of the products which are the subject of this application has been recognized by experts as distinctive. In litigation related to these products, Mr. Charles Mauro was recognized as an expert in industrial design and ergonomics. In testimony, Mr. Mauro stated:

Well, the Mini-Maglite is broadly regarded in the field of industrial design as an example of outstanding industrial design.

Mr. Mauro's qualifications and testimony follows as attachment B hereto.

A competitor of the products which are the subject matter of the present application, Mr. George Price, also has testified in litigation that in his experience this product, the "Mini-Mag", has become the accepted name for small Double A machined aluminum flashlights. He also testified as follows:

It was something new and different and filled a different need and certainly market acceptance by the consumer and industry has been just fantastic.

Mr. Price's testimony is attached as Attachment C.

A photographer and author of a book on American style, Mr. Richard Sexton, chose the subject matter of the present application, the Mini-Mag, as an excellent example of American design. His testimony is attached hereto as Attachment D.

A Professor of marketing management and a marketing consultant, Dr. Gerald Ford, has testified in litigation directed to related subject matter, that he found the "Mini-Mag" flashlight to be inherently distinctive:

Well, from a marketing prospective we can talk about distinctive words or

distinctive shapes, but inherently distinctive relates to -- we like to narrow to this shape -- relates to a shape that is unique and different from shapes that had preceded, let's say, a product shape on the market before that or on the market at the time. Basically what you are talking about -- at least what we talking about in marketing -- is inherently distinctive are products that have a distinct and different look, a noticeably different look from current or previous products in terms of shape.

\* \* \*

Q. [Interrogation by Mr. Jansen] What did you conclude from your market review as to whether the shape, style and overall appearance of the Mini-Maglite flashlight was inherently distinctive at the time of its introduction?

\* \* \*

A. [Testimony by Dr. Ford] In terms of a distinct different or unique look, I could find no evidence there was ever a flashlight in that marketplace that had the characteristic appearance of the Mini-Maglite, that it was a truly unique and different product in terms of look or appearance.

The testimony of Dr. Ford is attached hereto as Attachment E.

Mr. Ted Davis, a distributor of flashlights was aware of design recognition by the industry:

Q. How did the look of the Mini-Maglite flashlight compare to other

flashlights that you are aware of on the market prior to the Mini-Maglite flashlight?

A. Well, the Mini-Maglite flashlight was quite different than the lights I was aware of on the market. I thought it was a very unique, refreshing design, that the flashlight industry got pretty excited about it.

Q. What was your opinion concerning the appearance of the Mini-Maglite flashlight when you first saw it?

A. I thought it was different from any light that I had seen. I thought the styling and the look of the light were extremely attractive.

The testimony of Mr. Davis is attached hereto as Attachment F.

Mr. William Kelly, a retired engineer and marketing specialist with Ever-Ready Battery Company was asked about the feeling at Ever-Ready about the Mini-Maglite flashlight:

In the marketing group at Ever-Ready where I worked we watched all of our competitors, and we watched the marketplace to see what was going on. And obviously we looked at new Ray-O-Vacs and new Duracell flashlights or batteries or what have you. When the Maglite hit the market we were quite impressed with the design, with the way the light looked, we could see it appearing in stores. . . . So we're quite interested in getting our stuff out there and keeping our space on the rack and all of that kind of stuff, and we could see the Mini-Maglite come in and get space in the stores, and we were quite impressed

with the product.

This testimony of Mr. Kelly is attached hereto as Attachment G.

Dr. Berry Katz, a Senior Lecturer in the Design Division of the Department of Mechanical Engineering at Stanford University has studied the Mini-Maglite as being of high aesthetic quality. Mr. Katz' testimony is attached hereto as Attachment H.

Mr. Jack Miller, a consumer having substantial technical background, found the Mini-Maglite to be beautifully made, a totally unique design because of its unique appearance and different proportions and a work of art. Mr. Miller's testimony is attached hereto as Attachment I.

Design Not Dictated By Function

Martin Siegel, a consulting engineering and retired Professor of Mechanical Engineering at the University of Southern California, exhaustively studied the Mini-Maglite products subject to the present application and testified as to the lack of design functionality:

Q. Do you have an opinion as to whether or not the Mini-Maglite flashlight is one of a limited number of equally efficient designs in terms of manufacturing ease or manufacturing costs?

A. Well, it's not one of a limited number. There are a very large number of variations that could be made to the flashlight so that it's not a limited number, but there are many, many variations possible.

Mr. Siegel's testimony is attached hereto as Attachment J.

Dr. Hal Watson, a Professor of Mechanical Engineering at SMU and a consulting engineer found that the flashlights of others need not look identical to the Mini-Maglite in order to be competitive. Dr. Watson's testimony is attached hereto as Attachment K.

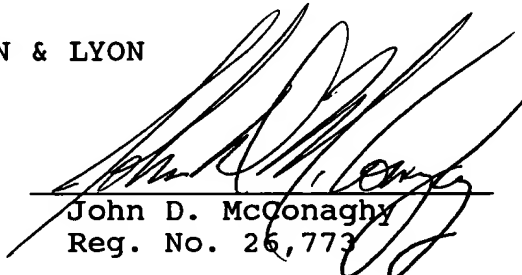
Thus, with over six million in sales and substantial recognition of the design as being new and distinctive, the subject matter of the present application has had a substantial impact because of its design features. The design is believed patentable in this context.

Respectfully submitted,

LYON & LYON

Date: May 13, 1991

By:

  
John D. McGonaghy  
Reg. No. 26,773

611 W. Sixth Street  
Los Angeles, CA 90017  
(202) 842-8400

ATTACHMENT A



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC., ) CA3-86-0427-G  
Plaintiff, )  
VS. )  
J. BAXTER BRINKMANN )  
INTERNATIONAL CORPORATION and )  
THE BRINKMANN CORPORATION, )  
Defendants. )  
\_\_\_\_\_)  
THE BRINKMANN CORPORATION, )  
Counter-claimant, )  
vs. )  
MAG INSTRUMENT, INC., )  
Counter-defendant. )  
\_\_\_\_\_) May 9, 1990

Volume 14  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury  
For the Plaintiff: LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson,  
Mr. Jerrold B. Reilly and  
Mr. Allen Jansen  
and  
STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

1 MR. WEISS: Thank you, your Honor. Are we ready to  
2 bring the jury in?

3 (Jury in)

4 THE COURT: Good morning, Ladies and Gentlemen.  
5 Welcome back. I hope all of you had a nice holiday for want  
6 of a better word. I believe when we recessed last Friday Mr.  
7 Keller was still testifying. Are we ready to proceed with  
8 him?

9 MR. WEISS: Yes, your Honor.

10 THE COURT: Mr. Keller, would you come back to the

12 MR. DON KELLER

13 CROSS EXAMINATION

14 BY MR. WEISS:

15 Q Mr. Keller, when we broke on Friday you were about to  
16 begin a discussion with respect to the development of the  
17 Mini-Maglite. Now, Mr. Maglica designed the Mini Maglite  
18 flashlight, didn't he?

19 A To my knowledge, yes.

20 Q Now, on Friday when Mr. Clark was questioning you, you

21 testified as follows: Question, did Mr. Maglica ever show  
22 you any prototypes of small Double A cell flashlights?

23 Answer: Yes.

24 Question: How did their shape compare to the  
25 Mini-Maglite flashlight?

1 BY MR. WEISS:

2 Q Now, Mr. Keller, I am going to show you Exhibits 2678  
3 through 2680 which are prototypes that Mr. Maglica testified  
4 about, and all of those prototypes have the shorter stubbier  
5 shape, don't they?

6 A Yes, they do.

7 Q Now, when the Mini-Maglite was being developed Mr. Maglica  
8 brought into you a series of sketches or drawings and asked  
9 everyone which shape they liked, correct?

10 A That's correct.

11 Q And the sketches showed different shapes and different  
12 designs, didn't they?

13 A The head shape only.

14 Q Now, with regard to these prototypes, these show the  
15 fatter barrel, don't they?

~~16 A Yes, they show the fatter barrel, yes.~~

17 Q Now, with regard to the shape, style and appearance of a  
18 flashlight, that's an important factor with regard to the  
19 sale of a flashlight, isn't it?

20 A It certainly has some bearing on it, yes.

21 Q And it's also true that customers are attracted to an  
22 aesthetically nice-looking flashlight, correct?

23 A Yes, that's correct.

24 Q And when the man Maglite was introduced, there was nothing  
25 on the market like it, correct?

1 A That's correct.

2 Q And the Mini-Maglite was distinctive, wasn't it?

3 A Yes, yes.

4 Q And you believed the Mini-Maglite would appear beautiful  
5 to customers when they saw it, correct?

6 A Yes.

7 Q And the good looks of the Mini-Maglite helped to sell it?

8 A Yes, that's correct.

9 Q And the Mini-Maglite was a phenomenal success, correct?

10 A Yes.

11 Q And the appearance of the Mini-Maglite was one of the  
12 reasons for that success, correct?

13 A Yes.

~~14 Q Now, Mr. Keller, you said that the Mini-Maglite~~

15 flashlight was just a scaled-down version of the bigger  
16 lights. Do you recall that?

17 A Yes.

18 Q Now --

19 MR. WEISS: May I approach the witness, your Honor?

20 THE COURT: Yes, Sir.

21 BY MR. WEISS:

22 Q I am going to hand you, Mr. Keller, Exhibit 6122. Would  
23 you identify this flashlight?

24 A This is a Maglite C cell.

25 Q Now, is that also a scaled-down version of the Maglite D

1 displayed that way? Out of the package?

2 A Not that I recall.

3 Q Are you aware of any display device that Brinkmann  
4 supplies retailers so it can display a Brinkmann Black Max  
5 flashlight out of the package?

6 A The only one I recall seeing is the kind of rack that  
7 would hold a dozen clam shells. I don't recall seeing

~~8 anything that would hold the light outside the packaging.~~

9 Q All right. Now, I believe you testified this morning that  
10 the Mini-Maglite flashlight was unique when it was  
11 introduced. What did you mean by that?

12 A That there was not another machined aluminum flashlight to  
13 put out that kind of candle power.

14 Q And you also said there was nothing like it on the market.  
15 What did you mean?

16 A There was nothing of that size on the market.

17 Q When you said it was distinctive, what did you mean?

18 A Distinctive in that it was made out of aluminum and had  
19 high candle power.

20 Q And when you said it appeared beautiful and that its good  
21 looks help to sell it, what did you mean?

22 A Just that. I think it had to have good looks to sell.

23 Q What was good looking about the Mini-Maglite flashlights?

24 A It had nice smooth lines, shiney surface.

~~25 Q And the witness asked you about an agreement you signed that~~

ATTACHMENT B

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF TEXAS  
3 DALLAS DIVISION

1 MAG INSTRUMENT, INC., )

CA3-86-0427-G

5 Plaintiff, )

6 VS. )

7 J. BAXTER BRINKMANN )  
8 INTERNATIONAL CORPORATION and )  
9 THE BRINKMANN CORPORATION, )

Defendants. )

10 \_\_\_\_\_ )  
11 THE BRINKMANN CORPORATION, )

12 Counter-claimant, )

13 vs. )

14 MAG INSTRUMENT, INC., )

15 Counter-defendant. )

April 26, 1990

16 Volume 8

17 Transcript of Trial

18 Before the Honorable A. Joe Fish, and a jury

19 For the Plaintiff:

LYON & LYON

611 West Sixth Street, 34th Floor  
Los Angeles, California 90017

20 BY: Mr. Robert C. Weiss,  
21 Mr. Roy Anderson,  
22 Mr. Jerrold B. Reilly and  
23 Mr. Allen Jansen

and

24 STRASBURGER & PRICE

901 Main Street, Suite 4300

Post Office Box 50100

25 Dallas, Texas 75202

BY: Mr. Robert K. Drummond

1 had seen a Mini-Maglite.

2 Answer: No, sir, he didn't.

3 Question: And it's still your testimony that the design  
4 of the Brinkmann flashlight was independently developed.

5 Answer: Absolutely.

6 That was your testimony, wasn't it?

7 A That's correct, that is my testimony.

8 Q What you are telling me today is if I had just been a  
9 little bit more precise in my question you might have told me  
10 then that the inside parts were copied. That what you are  
11 saying?

12 A All we ever talked about was the shape, style and  
13 appearance, and my contribution to the design was a basic  
14 shape, and that's what we always talked about as far as was  
15 it a copy.

16 MR. WEISS: I have no further questions.

17 MR. PHELAN: Neither do I.

18 THE COURT: Recross?

19 MR. PHELAN: No, sir.

20 THE COURT: Ms. Hall, you may step down. Who's the  
21 plaintiff's next witness?

22 MR. WEISS: Your Honor, I believe the next witness

23 MR. CHARLES MAURO

24 DIRECT EXAMINATION



1 BY MR. ANDERSON:

2 Q Please state your name.

3 A Charles Mauro.

4 Q Where do you live, Mr. Mauro?

5 A I live in New York and Connecticut with my family.

6 Q What do you do for a living?

7 A I'm an industrial designer and an ergonomics specialist.

8 Q What is your educational background?

9 A I have an undergraduate degree in industrial design,  
10 product design, and I have a masters in a field called  
11 ergonomics.

12 Q What courses did you study in your undergraduate program  
13 for receiving your degree in industrial design?

14 A The focus of my education related to designing the overall  
15 shape, style and appearance of products. I studied courses  
16 in design, also courses in model-making -- how to produce  
17 models of design that I worked on, and to a limited extent I  
18 also evaluated and worked on material processes, how products  
19 are actually produced.

20 Q Okay. Let me go through some of your experience. I  
21 believe after you got your degree you worked for Henry  
22 Dreyfuss Associates for three and a half years, and some of  
the clients you worked for and the products you worked on  
23 were Polaroid on an SX70 camera design and accessories. You  
work for John Deere on tractors combines, snowmobiles. You

1 worked for Bell Telephone on the first picture telephone and  
2 decorator telephones. You worked for Singer on consumer  
3 knitting machines and sewing machines. You work for American  
4 Airlines on designing in-flight service utensils, seating and  
5 interior cabin design, and you did work for AMF Bowling  
6 Equipment on scoring equipment and seating as well as other  
7 projects. Is that right?

8 A Yes, I did.

9 Q Now, when you worked on those projects, did you work on a  
10 team or did you work alone?

11 A Well, in that particular situation I always worked with a  
12 team member, and I was responsible for the industrial design  
13 of the product. That's the exterior appearance, and there  
14 was always a second team member which was an ergonomics  
15 expert, and that person was responsible for how the product  
16 actually functioned, how the user interacted with the  
17 product, whether it was save, reliable and easy to use.

18 Q And after you worked for Henry Dreyfus Associates you went  
19 on and got your degree in ergonomics?

20 A Yes, I did.

21 Q Can you explain for everyone what the term "ergonomics"  
22 means, what discipline is that?

23 A Ergonomics is a discipline that has come to be very  
24 important in about the last thirty years. It's an entirely  
25 separate discipline whereby the expert in that field studies

1 mechanics, anatomy, physiology, and you take the knowledge of  
2 human body which is very complex, and you take that knowledge  
3 to apply to make products more save and easy to use. For  
4 example, an ergonomics expert might work on a computer  
5 program to make it easier to use. We write the instructions  
6 and help to design the format of screens. An ergonomics  
7 expert would be called in to design the gripping and grasping  
8 and location of controls on a product, that sort of thing.

9 Q Now, what types of things did you study in getting your  
10 degree in ergonomics?

11 A Well, my area of specialization was primarily in  
12 biomechanics and anatomy and physiology, and it really  
13 focused on how the human body works as it grasps and moves  
14 about the world we live and work in today.

15 Q What was your masters thesis on?

16 A Well, I had always developed an interest in hand-held  
17 tools, and my final project there related to the examination  
18 of the biomechanics of the arm and hand and it's relationship  
19 to the design of hand tools. So I worked on developing a  
20 detailed understanding of that and how that understanding  
21 would impact on the design of tools.

22 Q How many industrial designers also have a degree in  
ergonomics?

23 A It's quite rare. About one percent.

24 Q What did you do after you got your degree in ergonomics?

1 A Well, I was approached by a head hunter while I was  
2 finishing my course work at NYU, and they set up an interview  
3 with a design firm in New York, Wren, Lowey International,  
4 and I went to work for the Lowey office.

5 Q And then after that you work for them for a while on  
6 certain things, and I believe you designed cat scan equipment  
7 there, correct?

8 A Yes, at the Lowey office I was responsible for a large  
9 design team, and I worked on the design of what they called  
10 cat scanners which are brain scanners. We worked on other  
11 high technology medical equipment and also worked on  
12 industrial equipment, tractors and things like that.

13 Q And then you went into business for yourself, and you  
14 started your own company. What are some of the types of  
15 projects and companies you've worked for since doing that?

16 A Well, I founded my own firm in 1975, and since then I have  
17 worked for an extremely interesting and broad range of  
18 clients. I worked on the redesign of the master control room  
19 for the space shuttle after the Challenger incident. Worked  
20 on surgical scapels, sewing machines, personal computers.

21 Q I believe you received a few grants and fellowships. You  
22 got a grant from the Ford Foundation for Industrial Design  
23 Excellence. You received a fellowship from the National  
24 Institute of Occupational Safety and Health on Ergonomics  
25 Research. And you received a grant to write a paper on the

1 Integration of Industrial Design and Ergonomics from the  
2 National Endowment of Arts; is that correct?

3 A Yes, sir.

4 Q And you are a member of Industrial Designers Society of  
5 America which is a governing body of industrial designers,  
6 and you have written several articles for their journals; is  
7 that? Correct.

8 A Yes, I have.

9 Q And you are also a member of the Human Factor Society  
10 which is a professional governing body of human factoring  
11 professionals that establishes policy for the field; is that  
12 right?

13 A Yes.

14 Q And you have written several articles for their  
15 publication, too; is that right?

16 A Yes, I have.

17 Q Now, what is the American National Standards Institute?

18 A That's a non-profit organization based in New York, and  
19 its primary function is to develop standardized approaches  
20 for engineering development. For example, that institution  
21 is very active in the development of standardized terms that  
22 engineers can use so that when one engineer is talking about  
23 a certain kind of bolt, let's say, an engineer in New York  
24 will know they are talking about the same kind of bolt. So  
25 it's an attempt to make terminology and some certain

1 engineering functions standardized, to make the design of  
2 products more efficient.

3 Q And you have served as chairman on two of their standard  
4 committees on ergonomic-related topics; is that right?

5 A Yes, I have.

6 Q And what's the Industrial Design Review?

7 A That's an annual design competition that is sponsored by  
8 Industrial Design Magazine which is one of the main magazines  
9 related to that field. It's an annual competition.

10 Q Have any of your product designs ever been included in  
11 that competition?

12 A Yes, a number of them have.

13 Q Have you ever won it?

14 A Yes, sir, I have.

15 Q Now, you have also published articles in Innovation  
16 Magazine which is the journal for the Industrial Designers  
17 Society; is that correct?

18 A Yes, I have.

19 Q What is the Presidential Designs Award Committee?

20 A That's a special committee set up to evaluate and  
21 recognize outstanding design that has been funded by the  
22 federal government.

23 Q How are the members of that committee selected?

24 A They are selected primarily by peer recommendation. Names  
25 are submitted to the Director of the National Endowment for

1 the Arts in Washington, D.C., and then he establishes a list  
2 of members.

3 Q Have you ever been a member of that committee?

4 A Yes, sir, I was on the first board.

5 Q What were your duties and responsibilities when you were  
6 on that board?

7 A My primary responsibility was to evaluate industrial  
8 design projects funded by the federal government for design  
9 excellence.

10 Q What criteria did you use to evaluate those designs?

11 A Well, the criteria I used in that case is basically the  
12 same criteria I use in all industrial design programs where  
13 I'm asked to evaluate the quality of the product, and it  
14 basically breaks down in three areas. First of all, is it a  
15 unique design, has it appeared before, is it attractive, is  
16 it memorable, does it convey a high quality appearance by the  
17 way it uses its materials in manufacture, and the third thing  
18 which is important is does the design in any way compromise  
19 or affect what I call a baseline ergonomic performance and  
20 manufacturing cost.

21 MR. ANDERSON: Your Honor, at this time we request  
22 Mr. Mauro be recognized as an expert in industrial design,  
23 and we would also ask that he be recognized as an expert in  
24 ergonomics, and in view of your Honor's pretrial rulings on  
25 offers of proof we would like to reserve some of the

1 testimony on the ergonomics issue.

2 THE COURT: All right. Any objection to the  
3 recognition of this witness as an expert in industrial design  
4 and ergonomics?

5 MR. CLARK: No, your Honor.

6 THE COURT: The Court will recognize Mr. Mauro as  
7 an expert in those areas, and I'll remind the jury this  
8 simply means that Mr. Mauro seems to have the credentials  
9 that would assist us in determining some of the issues in  
10 this case. However, it's still up to you to evaluate the  
11 validity of what he has to say.

12 MR. ANDERSON: Thank you, your Honor.

13 BY MR. ANDERSON:

14 Q Mr. Mauro, how did you first become aware of the design of  
15 the Mini-Maglite flashlight?

16 A Well, the first time I saw the Mini-Maglite was in a  
17 design store in New York, and since I'm very active in the  
18 field of industrial design, one of the things I do frequently  
19 is peruse the store where there is always good design, and I  
20 remember the first time I saw it it was on a shelf in one of  
21 the top design stores in New York.

22 Q Now, after your first exposure to it, what additional  
23 exposure, if any, did you have with the design of the  
24 Mini-Maglite flashlight before you were contacted to be an  
25 expert in this case?



1 A Well, the Mini-Maglite is broadly regarded in the field of  
2 industrial design as an example of outstanding industrial  
3 design. So it shows up in books and articles and various  
4 papers. It's used frequently as an example in design school  
5 courses. So it's the kind of thing that forms the bedrock of  
6 my profession. There are many classic designs, and I think  
7 that product has found its way into that category.

8 Q Well, what is your definition of good industrial design?

9 A Well, I can restate it again. It's the same criteria that  
10 I talked about before. A good industrial design is a product  
11 where the designer has developed an overall shape, style and  
12 appearance that is unique. Something that didn't exist  
13 before, that it's attractive and that it's memorable because  
14 I think that's very important. When you see a product you  
15 want to think about that product again. It should also have  
16 a high quality appearance that is to some extent dictated by  
17 how the designer chose to use the manufacturing processes.  
18 And the final measure of good industrial design is does all  
19 of that work. The overall shape, style and appearance, does  
20 it in any way compromise baseline function in terms of how  
21 the user interacts with it and does it compromise production  
22 cost, manufacturing.

23 Q As an expert in industrial design, what is your  
24 professional opinion as to whether or not the Mini-Maglite  
25 flashlight is an example of good industrial design?

1 A Well, I personally think that it's an outstanding piece of  
2 industrial design. I believe it has and will over time  
3 become a true design classic.

4 A Do you have one? Can you use one? Again going back to my  
5 criteria that I use when I judge in competition, when I  
6 evaluated the appearance of this product I look at some  
7 photographs and information of products that existed prior to  
8 this product, and it's my opinion that this is a very unique  
9 product. There was nothing of this size before it, and I  
10 don't believe there was a distinctive product that had an  
11 appearance that would carry over to this. It's a very  
12 attractive product, and you probably don't need me to tell  
13 you that, but it's good-looking and also very memorable.

14 The other aspect about this product is it just has a  
15 terrific high quality look to it. When you see it on the  
16 shelf or pick it up and carry it around, it's an outstanding  
17 product. The final point, why I think it's great industrial  
18 design, is that it does all of that -- the overall shape,  
19 style and appearance achieves those criteria which I  
20 previously talked about, but it still functions fundamentally  
21 okay in terms of ergonomics. In other words, the designer  
22 was able to make it look like this and function like this,  
23 but you can still use it, and also I think from the use of  
24 the materials from a manufacturing point of view it's a very  
25 good example.

1 Q Now, the terms "overall shape, style and appearance," is  
2 that type of terminology that you use in the profession?

3 A Well, designers use it all the time, and the reason that  
4 it's used like that is because when I deal with clients  
5 sometimes clients will think that style and shape are  
6 different. But really shape, style and appearance, those  
7 words, what they mean simply is design. Just put them all  
8 together and they really mean industrial design. What is the  
9 overall look of this product. So when I deal with clients, I  
10 usually put all three of those together, and it helps you  
11 know stop questions later on about, well, is style the same  
12 as shape.

13 Q Okay. What role, if any, does size play in design?

14 A Well, size is the starting point on every design program.  
15 It is the fundamental aspect of any design product, is the  
16 size of the product, and it's probably the single most  
17 important factor in terms of where you begin on a design  
18 problem. Design size is absolutely critical.

19 Q How would you define what is and what is not distinctive  
20 in terms of industrial design?

21 A Well, a product is distinctive -- you know -- all these  
22 questions really relate to the same criteria. A distinctive  
23 product is one that's unique and attractive and memorable.  
24 It's got a high quality look, and it achieves all of that  
25 without making it difficult to use and expensive. So that's

1 my definition of what a distinctive product is, and it's one  
2 I think you can use when you're evaluating acceptable  
3 alternatives.

4 Q In your opinion is the Mini-Maglite flashlight a  
5 distinctive product?

6 A It's absolutely distinctive.

7 Q Now, in saying that, have you considered the large Mag  
8 flashlights?

9 A Yes, sir, I have.

10 Q And why do you come to that conclusion in view of -- When  
11 you've got the large flashlight and now the Mini-Maglite, why  
12 do you say the Mini-Maglite is distinctive?

13 A Well, the first criteria, the overwhelming one is the  
14 size. This product is a completely different size than  
15 anything else that existed before it, and the shape, the  
16 proportion of the head shape to the body, the beautiful way  
17 in which this front section curves in and blends into the  
18 body.

19 Q What is the Museum of Modern Art?

20 A The Museum of Modern Art, I think we all pretty well know  
21 what it is.

22 Q Why, maybe not everybody does.

23 A It's a big museum in New York, and basically what it does  
24 is catalog and present products of outstanding art in the  
25 modern era, and one aspect of the Museum of Modern Art that's

1 important to me as an industrial designer is that they have a  
2 design collection of products which have been selected, and  
3 then they also have a design store where they sell products  
4 which are outstanding design examples.

5 Q What criteria do they use to select items for sale in that  
6 design store?

7 A The criteria that they use first of all is that the  
8 product has to be an outstanding example of contemporary  
9 modern design, that it's a high quality product, and it's  
10 designed -- you know the way it looks -- reflects the overall  
11 level of design excellence that's reflected in the museum,  
12 and it's a selective process. Products are submitted and  
13 they are evaluated, and if you are ever in New York go to the  
14 Museum of Modern Art store. It's probably the best education  
15 you can get in what is outstanding contemporary design.

16 Q Does that store sell the Mini-Maglite flashlight?

17 A Yes, sir, it does.

18 Q How does it display the Mini-Maglite flashlight?

19 A Well, as I recall, it's displayed in many different places  
20 in the museum store, but there is one place where it's  
21 displayed in a case with a spotlight on it, and it has a tag  
22 next to it which says manufactured by Mag Instrument,  
designed by Mr. Anthony Maglica.

~~23 [REDACTED]~~  
~~24 [REDACTED]~~  
25 industrial design?

ATTACHMENT C

MAG INSTRUMENT, INC.,

Plaintiff,

VS.

J. BAXTER BRINKMANN  
INTERNATIONAL CORPORATION and  
THE BRINKMANN CORPORATION,

**Defendants.**

THE BRINKMANN CORPORATION,

Counter-claimant,

**VS .**

MAG INSTRUMENT, INC.,

Counter-defendant.

CA3-86-0427-G

April 20, 1990

Volume 4  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff:

LYON & LYON

611 West Sixth Street, 34th Floor  
Los Angeles, California 90017

BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson and  
Mr. Jerrold B. Reilly

**and**

**STRASBURGER & PRICE**  
**901 Main Street, Suite 4300**  
**Post Office Box 50100**  
**Dallas, Texas 75202**  
**BY: Mr. Robert K. Drummond**

1 claimed to produce objects that similar there would be very  
2 serious questions about professional ethics.

3 Q If you asked a student to go out and make a wheel and  
4 someone came back with a triangle, would he flunk?

5 A We would have serious questions about the functionality of  
6 that design.

7 MR. WEIR: Thank you.

8 MR. DRUMMOND: No further questions, your Honor,  
9 May the witness be excused?

10 THE COURT: Any objection to excusing Mr. Katz?

~~MR. WEIR: No, sir.~~

12 THE COURT: You may be excused, Mr. Katz. Thank  
13 you. Who's the plaintiff's next next witness?

14 MR. WEISS: Mr. George Price, your Honor. He's by  
15 deposition. I'll have Mr. Reilly read the answers of  
16 Mr. Price.

17 THE COURT: Ladies and Gentlemen, you'll remember  
18 at the beginning of the case, I believe it was opening  
19 statement, I told you what a deposition by oral examination  
20 is and that under some circumstances the parties are entitled  
21 to offer the answers of a witness given during a deposition  
22 into evidence in this case. Of course, you will not be able  
23 to observe the demeanor of the witness testifying, and so  
24 that is somewhat of a handicap in evaluating the credibility  
25 of the witness and the weight to be given to his or her



1 testimony when this procedure is used. However, to the  
2 extent possible you should give the testimony of a witness  
3 who testifies by deposition the same weight and evaluation in  
4 the same manner as you would any witness who has appeared  
5 before you live.

6 Are we ready to proceed, Mr. Weiss?

7 MR. WEISS: Yes, your Honor. Would you turn to  
8 Page 469 of Mr. Price's testimony.

9 Q Please state your name.

10 A George Thomas Price, III.

11 Q Where are you employed?

12 A I'm employed by G.T. Price Products Incorporated.

13 Q Isn't it true that you are also the founder and sole  
14 shareholders of G.T. Price Products Incorporated?

15 A Yes, I am.

16 Q What type of products does G.T. Price Products, Inc.,  
17 manufacture?

18 A All types of flashlights -- metal, plastic, C cell, D  
19 cell.

20 Q Would you please describe some of your more popular  
21 flashlights?

22 A Well, the plastic ones would be -- We make all the  
23 flashlights for the U.S. Government, the Army-Navy type  
24 flashlights. We make the flashlights for Bell Telephone and  
25 many private-labeled brands in plastics. In the metal we

1 make four different particular units. We make the Code 4,  
2 Smoke Cutter, Power Probe and Barry Probe.

3 MR. WEISS: Turn to Page 479.

4 Q Mr. Price, do you consider yourself to be a competitor of  
5 Mag Instrument?

6 A Yes, I do.

7 Q Do you manufacture any machined aluminum flashlight  
8 products?

9 A Yes, sir.

10 MR. WEISS: Now, down at Line 20.

11 Q Does G.T. Price Products market a Double A machined  
12 aluminum flashlight?

13 A Yes.

14 Q What is the name of that flashlight?

15 A Code 4 Junior.

16 Q When did you become interested in adding a machined  
17 aluminum Double A flashlight to your product line?

18 A In 1985 the time that I bought the metal flashlight  
19 division from L.A. Screw Company.

20 MR. WEISS: Would you turn to Page 480, Line 5.

21 Q How many different designs did you consider for the  
22 appearance of your Double A size machined aluminum  
23 flashlight?

24 A Oh, at least twenty.

25 Q Did you choose any of those designs which were presented

1 Q Do you still consider yourself to be in competition with  
2 these companies?

3 A Yes, sir.

4 MR. DRUMMOND: Turn to Page 492, Line 5.

5 Q When the Mini-Maglite flashlight was introduced in the  
6 market, was there anything like it?

7 A Not that I know of.

8 Q Do you know whether the Mini-Maglite has become the  
9 standard in the industry for Double A size machined aluminum  
10 flashlights?

11 A When I first investigated the L.A. Screw flashlight,  
12 whether I wanted to buy it, the first thing that came up with  
13 many of the people that I talked about it with was to find  
14 out about -- well, to find out about market acceptability of  
15 the Code 4 was do they have Mini-Mag, and it was always used  
16 as the term "Mini-Mag." In my experience in the industry  
17 certainly that has become the accepted name for the small  
18 Double A machined aluminum flashlight.

19 Q Do you personally agree with that opinion in the industry?

20 A Well, I have always felt since I first saw it that it was  
21 the greatest thing to hit the flashlight industry in my  
22 twenty-eight years in the business. It was something new and  
23 different and filled a different need and certainly market  
24 acceptance by the consumer and industry has been just  
25 fantastic. In fact, we had to come out with a unit in order

1 to compete in the metal flashlight field. It was a  
2 necessity.

3 MR. WEISS: Page 505.

4 Q Mr. Price, how would you characterize the quality of the  
5 Mini-Maglite flashlight?

6 A Excellent.

7 MR. WEISS: That's all the questions I have for

8 Mr. Price, your Honor.

9 THE COURT: Do the defendants have any additional  
10 offers from this deposition at this time?

11 MR. CLARK: Yes, we do, your Honor. We're slightly  
12 handicapped because there is one physical exhibit referred to  
13 in this portion which I would like to read that's in the  
14 possession of plaintiff. We would like to read this and then  
15 introduce the physical later. Would that be acceptable?

16 THE COURT: Fine with me.

17 MR. CLARK: Sir, would you turn to Page 494, Line  
18 18. We're going to read from Lines 18 to 21.

19 Q Mr. Price, did you feel that a small aluminum flashlight  
20 was a logical extension of your Code 4 line of machined  
21 aluminum flashlights?

22 A Yes, it was and is.

23 MR. CLARK: 495, Lines 22 to 25.

24 Q Mr. Price, during the time that you were undertaking the  
25 design or having the design done for a small aluminum

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

1	MAG INSTRUMENT, INC.,	)	CA3-86-0427-G
2		)	
3	Plaintiff,	)	
4		)	
5	VS.	)	
6		)	
7	J. BAXTER BRINKMANN	)	
8	INTERNATIONAL CORPORATION and	)	
9	THE BRINKMANN CORPORATION,	)	
10	Defendants.	)	
11	<hr/>		
12	THE BRINKMANN CORPORATION,	)	
13		)	
14	Counter-claimant,	)	
15		)	
16	vs.	)	
17		)	
18	MAG INSTRUMENT, INC.,	)	
19		)	
20	Counter-defendant.	)	
21	<hr/>		
22		)	April 23, 1990

Volume 5  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff: LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson  
Mr. Jerrold B. Reilly  
and Mr. Allen Jansen

and

**COPY**

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

1 small aluminum flashlights that were not Mag flashlights

2 BY MR. ANDERSON:

3 Q And why are you appearing here today, Mr. Davis?

4 A I'm here today because two months ago Mr. Maglica asked me  
5 if I would come and answer questions about the flashlight  
6 business and my involvement in it, and that's why I'm here.

7 MR. ANDERSON: Thank you, your Honor.

8 THE COURT: Any further cross examination?

9 MR. CLARK: No, your Honor.

10 THE COURT: May we excuse Mr. Davis?

11 MR. ANDERSON: Yes, your Honor.

12 THE COURT: Mr. Davis, you may be excused. Thank  
13 you, sir.

14 THE COURT: Who's your next witness?

15 MR. WEISS: The next witness, your Honor, is  
16 Richard Sexton.

18 MR. RICHARD SEXTON

19 DIRECT EXAMINATION

20 BY MR. JANSEN:

21 Q Would you please state your full name for the record?

22 A Richard Sexton.

23 Q Mr. Sexton, are you presently employed?

24 A Yes, I am.

25 Q By whom are you employed?

1 A I'm a freelance commercial photographer in San Francisco.

2 Q What do you do as a photographer?

3 A Well, I specialize in architectural interior photography.

4 I work for architects and designers photographing their work.

5 Q How long have you been a commercial photographer?

6 A I been doing it a little over ten years now.

7 Q Do you specialize in any particular type of commercial  
8 photography?

9 A Well, as I stated architectural interiors photography.

10 Q Would you briefly trace your education background?

11 A Well, I have BA from Emory University in Atlanta, and I  
12 subsequently studied briefly at the San Francisco Art  
13 Institute for a year.

14 Q Would you briefly trace your professional background and  
15 things of that nature?

16 A Well, my clients in San Francisco are architects and  
17 interior designers, occasionally manufacturers of related  
18 materials such as furniture and lighting systems and that  
19 sort of thing.

20 Q Now, have you been a lecturer or speaker before?

21 A Yes, I have spoken. Pursuant to the books that I have  
22 written, I have made appearances on radio and so forth.

23 Q Are you in the academic field at all?

24 A Yes, I also teach at the Academy of Art College in San  
25 Francisco. I teach photography there.



1 Q Have you received any awards or accommodations?

2 A Yes, I have. I have received an award from the American  
3 Institute of Architects. I also received a California  
4 Preservation Award, and my work has been published in major  
5 consumer and trade magazines, both in the United States and a  
6 few in Europe as well.

7 Q Now, you indicated that you were an author. What type of  
8 publications have you written or authored?

9 A Well, I have done two books that have been published. The  
10 first book was American Style. The second book was the  
11 Cottage Book, and I'm currently collaborating with an  
12 historian on a third book which will be published in 1991.  
13 There is no working title as yet, but the subject matter is  
14 victorian architecture of San Francisco.

15 MR. JANSEN: Your Honor, may I approach the witness  
16 with Exhibit 2154?

17 THE COURT: Yes, sir.

18 BY MR. JANSEN:

19 Q Mr. Sexton, do you recognize Exhibit 2154?

20 A Yes, it's the first book that I mentioned, American Style.

21 Q And you are the author of that book?

22 A I am.

23 Q What was the theme or purpose of your book, American  
24 Style?

25 A Well, it's a show case of American products, and I think

1 more specifically my intent was to do a photo essay on  
2 American culture through the window of product design.

3 MR. JANSEN: Your Honor, I would offer in evidence  
4 Exhibit 2154.

5 THE COURT: Any objection?

6 MR. CLARK: Yes, your Honor, relevance, 403,  
7 hearsay.

8 THE COURT: Overruled. Plaintiff's Exhibit 2154 is  
9 admitted.

10 BY MR. JANSEN:

11 Q When did you author your book, American Style?

12 A Well, I came up with the idea for it in the fall of 1984  
13 and received a contract to do the book at the beginning of  
14 1985. I worked on it through the years 1985 and 1986, and it  
15 was published in June of 1987. So the entire production  
16 cycle on the book was a little over two and a half years.

17 Q What got you interested in this project which culminated  
18 in the publication of this book?

19 A Well, I had always been interested in product design,  
20 being a photographer and in the specialty that I was working  
21 within, I worked for people in design, whether it was  
22 buildings or products, and I had just through my interest in  
23 industrial design came to want to do a book of this type.

24 Q How many hours did you spend on your book, American Style?

25 A Thousands. This was my first book, and for that reason

1       there was an awful lot of time invested in it. I would say  
2       over the two and a half year time period there that as much  
3       as thirty percent of my time to almost a hundred percent of  
4       my time was spent working on the project.

5       Q Now, you indicated I believe that your book was a  
6       collection of photographs and essay materials concerning  
7       products. How many different products did you review in the  
8       selection process?

9       A Well, there were literally thousands. There is only a  
10      hundred and thirty or so products included in the book, but  
11      out of that, virtually any product designed in America could  
12      have been included, and literally thousands of things were  
13      looked at as possible things that might be appropriate.

14      Q Now, can you describe for us some of the products that are  
15      included in your book, American Style?

16      A Well, for the most part they are classic American things  
17      like Coca Cola, the Webber Grill, Stetson hats,  
18      Harley-Davidson motorcycles, things that are strongly  
19      identified with American culture.

20      Q Do you have any light products in your books?

21      A Yes, there is a lamp and a Mag flashlight.

22      Q Now, which Mag flashlight is in your book?

23      A It's the Mini-Mag.

24      Q What made you choose the Mini-Maglite flashlight for  
25      inclusion in your book American Style?

1 A Well, I think first and foremost -- and this is a common  
2 denominator with all the products in the book -- is I felt it  
3 was a good design aesthetically, a good design from a  
4 functional standpoint, performed well, had a solid reputation  
5 on the marketplace, and I think anybody purporting to be  
6 doing a book showcasing what they considered to be  
7 outstanding product design would have as their first criteria  
8 that it be a good design. It also typified I felt an aspect  
9 of the way products were designed in America that could be  
10 considered somewhat of a unique trait, and I think I could  
11 refer to other things perhaps like the stainless steel  
12 thermas or Kitchen Aid mixer, the over-engineered, over-built  
13 product that was extremely rugged. I considered that to be  
14 one of the traits that went into this concept of American  
15 Style.

16 Q Now, were you aware of the Maglite flashlight at the time  
17 that you chose to put the Mini-Maglite flashlight in your  
18 book?

19 A Oh, yes, I was aware of the entire product line and  
20 thought highly of all of their products.

21 Q Why did you choose the Mini-Maglite flashlight?

22 A I was trying to make the book as consumer oriented as  
23 possible. I wanted to include things the average guy might  
24 relate to as opposed to things that are used in industry or  
25 have primarily commercial use, and the Mini-Mag was a

1 consumer oriented product in their line whereas many of the  
2 other larger flashlights were more industrial.

3 Q Perhaps, if you would, Mr. Sexton, please show the jury  
4 with the Court's permission where the Mini-Maglite flashlight  
5 is in your book. I believe it's the yellow tag.

6 A (Indicates.)

7 Q Now, at the time that you put the Mini-Maglite flashlight  
8 in your book, were you aware of mini-flashlights by other  
9 manufacturers?

10 A Oh, sure, I looked at a lot.

11 Q You look at --

12 A A lot of utilitarian products like that.

13 Q Now, based upon your review of these other flashlights, do  
14 you believe that the Mini-Maglite flashlight was distinctive  
15 in its shape, style and appearance?

16 A Certainly.

17 MR. CLARK: Objection, your Honor, move to strike,  
18 calls for a conclusion.

19 THE COURT: Overruled.

20 MR. JANSEN: Your Honor, I have no further  
21 questions.

22 THE COURT: Cross examination, Mr. Clark?

23 MR. CLARK: Yes, your Honor.

24 CROSS EXAMINATION

25 BY MR. CLARK:

ATTACHMENT E

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,	)	CA3-86-0427-G
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
J. BAXTER BRINKMANN	)	
INTERNATIONAL CORPORATION and	)	
THE BRINKMANN CORPORATION,	)	
	)	
Defendants.	)	
<hr/>		
THE BRINKMANN CORPORATION,	)	
	)	
Counter-claimant,	)	
	)	
vs.	)	
	)	
MAG INSTRUMENT, INC.,	)	
	)	
Counter-defendant.	)	
<hr/>		
	)	May 3, 1990

Volume 12  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff: LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson,  
Mr. Jerrold B. Reilly  
and Mr. Allen Jansen

and

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

**COPY**

VOLUME 12

CASSIDI L. CASEY, CSR, RPR (214) 767-0774

1 Q And they asked you would you help us with that suit and  
2 you said sure?

3 A Yes.

4 Q And that's when you signed your affidavit?

5 A Yes, sir, relating to the D cell flashlights.

6 Q But you signed that affidavit talking about the Maglite  
7 line of flashlights knowing that the Mini-Maglite existed and  
8 was in suit?

9 A Yes, with the Maglite line of flashlights.

10 MR. PHELAN: Pass the witness.

11 THE COURT: May we excuse Mr. Miller?

12 MR. ANDERSON: Yes, your Honor.

13 THE COURT: Mr. Miller, you may be excused.

14 MR. PHELAN: Your Honor, I may need to make a bill  
15 with him. I may need to hold him for that on the exhibit  
16 question.

17 THE COURT: All right. We may not be entirely  
18 through with your testimony, Mr. Miller. Who's the  
19 plaintiff's next witness?

20 MR. JANSEN: Your Honor, the plaintiff calls to the

21 ~~stand Dr. Gerald Ford~~

22 DR. GERALD FORD

23 DIRECT EXAMINATION

24 BY MR. JANSEN:

25 Q Would you please state your name for record?

VOLUME 12

CASSIDI L. CASEY, CSR, RPR (214) 767-0774



1 A Gerald Louis Ford.

2 Q What is your present occupation?

3 A I'm a fully tenured Associate Professor of Marketing  
4 Management at California State University in Long Beach. I'm  
5 also a partner in the marketing consulting firm of Ford,  
6 Bubala & Associates in Long Beach, California.

7 Q What undergraduate degrees do you hold?

8 A I have an undergraduate degree in advertising from  
9 California State University Campus in San Jose. I have an  
10 MBA or masters in business administration from the University  
11 of Southern California and I have a doctoral degree in  
12 Business Administration from the University of Southern  
13 California.

14 Q Now, how long have you held your academic appointment?

15 A A little over twenty years now. I first received my  
16 academic appointment in September of 1969.

17 Q As part of your academic appointment you are a teacher,  
18 instructor?

19 A Yes, sir.

20 Q And what subjects have you taught during this period of  
21 time?

22 A I have been responsible for teaching graduate and  
23 undergraduate courses in a variety of areas, particularly in  
24 business policy and strategy and a variety of marketing  
25 courses including market management, advertising, consumer

1 behavior, marketing research and promotion, and in addition  
2 as a visiting professor at the University of Southern  
3 California I have taught graduate classes in marketing  
4 research and marketing management.

5 Q Now, one of the courses that you taught related to this  
6 concept of consumer behavior. Would you please explain to us  
7 and the jury what you mean by consumer behavior?

8 A Almost a definition of the words. A study in consumer  
9 behavior is generally a study that focuses on the way in  
10 which folks like you and I behave in the marketplace. One of  
11 the particular focuses in a study of consumer behavior is the  
12 influence of such things as attitudes, values, beliefs,  
13 perception as they impact the purchasing process. Of  
14 particular importance I think to at least academic types and  
15 nonacademic types -- businessmen -- who were interested in  
16 consumer behavior are the stages that you and I go through as  
17 consumers in the purchasing process. Our prepurchase  
18 behavior, our purchase decision and our post-purchase  
19 behavior if you will.

20 Q Now, you mentioned that you taught courses in advertising.  
21 Can you tell us the nature of those courses?

22 A Yes, sir. Like most courses in advertising, the courses I  
23 have thought have generally dealt with two aspects of  
24 advertising: Functional aspects of advertising such as media  
25 placement, media scheduling, advertising, formatted layout

1 and design and copy; and probably as much emphasis on the  
2 nonfunctional aspect of advertising being advertising  
3 strategy and tactics.

4 Q Now, could you briefly describe the nature of remaining  
5 courses that you have taught, Doctor?

6 A The remaining courses are a variety of marketings courses  
7 from promotion to marketing management that deal with a  
8 variety of marketing such as you might imagine, things like  
9 sales programs and promotional plans and product positioning  
10 and competitive analysis. And in addition to that I am the  
11 senior faculty member responsible for teaching both graduate  
12 and undergraduate students the capstone course at our  
13 university that is required of all students getting a degree,  
14 and that's courses in business policy and strategy. That  
15 particular course deals with a develop of a composite  
16 strategic plan for a business obviously of which marketing  
17 aspects are of significant proportions.

18 Q Have you received any awards or accommodations for your  
19 work?

20 A I have been reasonably fortunate. I received an award  
21 from the American Association of Advertising Agency for my  
22 Study of Advertising Principles and Practices. In addition  
23 to that, as a doctoral candidate at the University of  
24 Southern California I was first awarded a <sup>Gross-Lockwood</sup> ~~Grosloky (phonetic)~~  
25 fellowship and subsequently named Commerce Associate Scholar.

1 Recently about a year half go I was elected to the Editorial  
2 Review Board of Merrill Publishing for their text on Business  
3 Marketing and Strategy and Management.

4 Q Do you belong to any professional societies?

5 A I'm a member of America Marketing Association, Academy of  
6 Advertising, the America Society of Professional Consultants,  
7 and I'm also a member of United States Trademark Association.

8 Q Earlier you mentioned your company called Ford, Bubala &  
9 Associates. Have you had any professional appointment<sup>other</sup> with  
10 Ford Bubala and outside your academic appointment?

11 A I have. Approximately between 1970 and 1973 I was  
12 retained by the U.S. Department of Commerce office of  
13 Minority Business Enterprise to provide consulting assistance  
14 to economic development with corporations that had been  
15 funded by the federal government, to provide assistance to  
16 small minority-owned businesses. I provided marketing  
17 consulting assistance to those economic development  
18 corporations as well as their clients. In addition to that  
19 between 1971 and 1976 I was retainer with the U.S. Department  
20 of State where I traveled extensively in Eastern European  
21 where I lectured to Eastern European businessmen on the  
22 American Marketing Principles and Manufacturing. And  
23 finally, from 1978 I believe through January of 1986 I was on  
24 a retainer with the National Aeronautics and Space  
25 Association to provide assistance to them in their efforts to

1 sell licenses to American manufacturers for space-related  
2 technology.

3 Q Now, what does Ford, Bubala & Associates do? What kind of  
4 company is it?

5 A It's a management and marketing consulting firm. We  
6 generally provide -- or the area in which I do most of my  
7 work is providing consulting assistance to firms on high  
8 level strategic marketing issues. We provide a variety of  
9 services in that regard, everything from competitive  
10 evaluations to product analysis to market investigations and  
11 analyses.

12 Q Now, what is your position with Ford, Bubala & Associates?

13 A Depends on who you ask in the office. I consider myself  
14 the senior member at least in providing assistance --  
15 marketing assistance to our clients, but there is some  
16 dispute sometimes among the younger members of the firm.

17 ~~Q Does your work at Ford, Bubala, involve trademarks?~~

18 A Yes, it does. As you might imagine trademarks would be an  
19 issue that could come up for a number of our clients and they  
20 do.

21 Q Could you briefly describe some of work that you have done  
22 with some of your clients that were involved in the subject  
23 matter of trademarks?

24 A Well, it comes up in varying degrees, depending upon what  
25 the particular consulting engagement may bring with it. New

1 THE COURT: May we excuse Mr. Bianchi?

2 MR. WEISS: Yes, your Honor.

3 THE COURT: Mr. Bianchi, you may be excused. Thank  
4 you. Are we ready to resume with the testimony of Dr. Ford?

5 MR. JANSEN: Your Honor, may I place this board on  
6 an easel?

7 THE COURT: Yes, please.

8 DR. GERALD FORD

9 DIRECT EXAMINATION (cont'd)

10 BY MR. JANSEN:

11 Q Dr. Ford, when we broke you were talking about various  
12 products that were in the flashlight market, and you were  
13 discussing the different factors that define those products.  
14 And as we broke I was going to ask you, have you been able to  
15 identify competitors of Mag Instrument in the flashlight  
16 market? Let's talk about in particular the small flashlight,  
17 mini-flashlights.

18 A Well, generally the competitors to the Mini-Maglite  
19 flashlight are competitors of a Double A or Triple A size  
20 battery that would be considered premium quality flashlights  
21 in terms of price and quality of construction, either plastic  
22 versus aluminum. There were a variety of competitors that  
23 were in that market prior to the Mini-Maglite and  
24 considerably more after the Mini-Maglite. Probably upon the  
25 entrance of the Mini-Maglite that market was rather small.

1 The entire premium market for flashlights was a very small  
2 consumer market that was generally reserved for industrial  
3 flashlights or special purpose flashlights like industry and  
4 safety, as we have heard, as well as special application  
5 flashlights for such things as hunting or fishing, but within  
6 that market there were competitors that preceded the  
7 Mini-Mag, and there are a number of competitors obviously  
8 that have followed the Mini-Mag.

9 Q So if we refer to the board over here, Dr. Ford, which is  
10 marked for identification as Exhibit 3702, what you are  
11 saying is that -- what you've said is that the small premium  
12 flashlight market including the premium -- machined aluminum  
13 flashlights ~~rather~~ were the types of things in the  
14 marketplace at the time of the introduction of Mini-Maglite  
15 flashlight?

16 A Or prior to. Some of those are prior to the introduction.

17 Q Now, based upon your expertise and experience do you have  
18 an understanding as to the meaning of the term "inherent  
19 distinctive" as it relates to trademarks?

20 A Only from a marketing perspective.

21 Q What is that understanding?

22 MR. WEIR: Objection, your Honor, relevance. From  
23 a marketing perspective as opposed to a trademark  
24 perspective.

25 THE COURT: Overruled.

1 A Well, from a marketing perspective we can talk about  
2 distinctive words or distinctive shapes, but inherently  
3 distinctive relates to -- we like to narrow to this shape --  
4 relates to a shape that is unique and different from shapes  
5 that had preceded, let's say, a product shape on the market  
6 before that or on the market at the time. Basically what you  
7 are talking about -- at least what we talking about in  
8 marketing -- is inherently distinctive are products that have  
9 a distinct and different look, a noticeably different look  
10 from current or previous products in terms of shape.

11 Q Now, in connection with this lawsuit, have you undertaken  
12 an investigation to determine whether or not the overall  
13 shape, style and appearance of the Mini-Maglite flashlight  
14 was inherently distinctive at the time of its introduction?

15 A In terms of the shape, style and appearance of that  
16 flashlight relative to competitors on the market at that  
17 moment as well as prior competitors, I have. I included that  
18 in my interviews with executives from Durabeam and Ray-O-Vac.  
19 To the degree from which that information was available from  
20 public sources, it was reviewed. Discussions with other  
21 parties for example, Mr. Kelly, Mr. Miller who had  
22 collections of flashlights, machined aluminum, nonmachined  
23 aluminum going back a number of decades I reviewed. An  
24 example of those are on the board there.

25 Q What did you conclude from your market review as to



1 whether the shape, style and overall appearance of the  
2 Mini-Maglite flashlight was inherently distinctive at the  
3 time of its introduction?

4 MR. WEIR: Objection, no foundation, irrelevant.  
5 No foundation that he understands the term "inherently  
6 distinctive." I think it's confusing to the jury to allow  
7 him to give this testimony.

8 THE COURT: Overruled.

9 A In terms of a distinct different or unique look, I could  
10 find no evidence there was ever a flashlight in that  
11 marketplace that had the characteristic appearance of the  
12 Mini-Maglite, that it was a truly unique and different  
13 product in terms of look or appearance. BY MR. JANSEN:

14 ~~Q Now do you have an understanding as to the meaning of the~~  
15 term "secondary meaning" as it relates to trademarks?

16 A In marketing we call it source association. But from a  
17 marketing perspective I do have an understanding of the term  
18 "secondary meaning."

19 Q What is your understanding?

20 A Secondary meaning at least from a marketing or consumer  
21 behavior point of view is when a word or shape or symbol  
22 functions in the mind of the consumer so as to identify the  
23 source of products in terms of -- in terms of a single --  
24 That is, that source association in the minds of consumers  
25 indicates that the consumer recognizes for example a product

ATTACHMENT F

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,	)	CA3-86-0427-G
Plaintiff,	)	
VS.	)	
J. BAXTER BRINKMANN	)	
INTERNATIONAL CORPORATION and	)	
THE BRINKMANN CORPORATION,	)	
Defendants.	)	
<hr/>		
THE BRINKMANN CORPORATION,	)	
Counter-claimant,	)	
vs.	)	
MAG INSTRUMENT, INC.,	)	
Counter-defendant.	)	
<hr/>		April 23, 1990

Volume 5  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff: LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson  
Mr. Jerrold B. Reilly  
and Mr. Allen Jansen

and

**COPY**

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

1 MR. TED DAVIS

2 DIRECT EXAMINATION

3 BY MR. ANDERSON:

4 Q Mr. Davis, what is your educational background?

5 A My educational background is bachelor of science degree  
6 from Georgia Tech and MBA from the Harvard Business School.

7 Q What did you do after you graduated from Harvard Business  
8 School?

9 A I joined Touche, Ross Company, a national CPA firm, stayed  
10 with Touche, Ross for five years.

11 Q Where did you work for Touche, Ross?

12 A In Atlanta.

13 Q What did you do after you worked for Touche, Ross?

14 A Joined Fuqua Industries as Assistant Corporate Controller.

15 Q Was that also in Atlanta?

16 A Yes, it was.

17 Q How long did you work for Fuqua Industries in Atlanta?

18 A For five years.

19 Q What did you do next?

20 A With Fuqua I went to Columbus, Ohio to become president of  
21 a Fuqua subsidiary.

22 Q And what are you doing today?

23 A Well, today I'm Chairman and President of Dorcy  
24 International which was a Fuqua subsidiary until we were able  
25 to buy it from Fuqua five years ago.

1 Q And the name of the subsidiary today is Dorcy  
2 International; is that correct?

3 A Dorcy International.

4 Q What is Dorcy's business?

5 A We sell packaged consumer goods to national retail chains,  
6 Sears, Wal-mart, K-Mart, accounts like that. Products we  
7 sell, mostly flashlights. We also have a line of lawn mower  
8 parts and garden tools that we sell to these accounts.

9 Q When did Dorcy get into the flashlight business?

10 A Dorcy got into the flashlight business in 1977.

11 Q What types of flashlights does Dorcy sell?

12 A We have a complete range of flashlights. We have  
13 everything from small disposable pen lights up through the  
14 larger florescent lanterns.

15 Q Can you give us an idea of approximately how many  
16 flashlights Dorcy sold in 1989?

17 A In 1989 up Dorcy sold approximately seven and a half  
18 million individual flashlight units in 1989.

19 ~~MR. ANDERSON: I have no further questions at this time.~~  
20 permission to approach the witness and give him Exhibit 3360.

21 THE COURT: Yes, sir.

22 BY MR. ANDERSON:

23 Q Mr. Davis, what is Exhibit 3360?

24 A These are individual pages out of our lighting product  
25 catalog.

1 Q Are you familiar with Mag's Mini-Maglite flashlight?

2 A Yes, I am.

3 Q When did you become aware of the Mini-Maglite flashlight?

4 A I became personally aware in 1986.

5 Q How did the look of the Mini-Maglite flashlight compare to  
6 other flashlights that you were aware of on the market prior  
7 to the Mini-Maglite flashlight?

8 A Well, the Mini-Maglite flashlight was quite different than  
9 the lights I was aware of on the market. I thought it was a  
10 very unique, refreshing design, that the flashlight industry  
11 got pretty excited about it.

12 Q What was your opinion concerning the appearance of the  
13 Mini-Maglite flashlight when you first saw it?

14 A I thought it was different from any light that I had seen.  
15 I thought the styling and the look of the light were  
16 extremely attractive.

17 Q Are you aware of Brinkmann's small flashlight that is also  
18 a Double A machined aluminum flashlight?

19 A Yes.

20 Q In your opinion as president of a flashlight manufacturer,  
21 how does the look of that flashlight compare to the look of  
22 the Mini-Maglite flashlight?

23 A They are certainly similar.

24 ~~Q Has anyone ever sold a machined aluminum flashlight?~~  
25 ~~flashlight?~~

ATTACHMENT G

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC., ) CA3-86-0427-G  
Plaintiff, )  
VS. )

J. BAXTER BRINKMANN )  
INTERNATIONAL CORPORATION and )  
THE BRINKMANN CORPORATION, )  
Defendants. )

THE BRINKMANN CORPORATION, )  
Counter-claimant, )  
vs. )  
MAG INSTRUMENT, INC., )  
Counter-defendant. )

April 17, 1990

Volume 1  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff:

LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson and  
Mr. Allan Jansen

and

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

**COPY**



1 any such expert witnesses to remain in the courtroom. I will  
2 ask counsel for both sides to be vigilant as people come in  
3 and out of the courtroom because I think it's more likely  
4 that you would recognize a prospective witness than I. If  
5 there are any witnesses subject to the provisions of the rule  
6 who are now in the courtroom, they should leave at this time.  
7 Are you ready to proceed, counsel.

9

MR. WILLIAM KELLY

10

DIRECT EXAMINATION

11

BY MR. JANSEN:

12

Q Would you please <sup>STATE YOUR</sup> full <sup>name</sup> for the record?

13

A William T. Kelly, III.

14

Q Mr. Kelly, where do you reside?

15

A In West Redding, Connecticut.

16

Q What is your present occupation?

17

A For many years I worked for Ever-Ready Battery Company,  
18 but right now I'm retired.

19

Q And where is Ever-Ready located?

20

A They are in Saint Louis, Missouri. They are now part of  
21 Ralston Purina.

22

Q How long were you employed by Ever-Ready?

23

A 35 years.

24

Q And what type of products did Ever-Ready make?

25

A Batteries and lantern lighting products, including

1 flashlights.

2 Q Now, would you briefly describe your educational  
3 background?

4 A I have a B.S. degree in industrial administration granted  
5 in 1952 from Yale University.

6 Q Have you taken any other courses since graduating from  
7 Yale?

8 A Not formal courses though I have had training in things  
9 like accounting practices and taught by the Union Carbide  
10 Training Corporation things like principles of management.  
11 Taught by an industrial consultant, problem solving,  
12 executive problem solving, taught by Kepner Trego. These are  
13 week-long courses for business people, but they are not a  
14 degree type of course.

15 Q Would you briefly trace your employment background prior  
16 to joining Ever-Ready?

17 A I had two jobs, one with Shell Oil Company and one with  
18 American Brake Shoe while I was in college, and two weeks  
19 after getting out of school if I went to Ever-Ready.

20 Q So your entire professional career has been with  
21 Ever-Ready?

22 A Yes.

23 Q Did you do any military service?

24 A Army two years 1954 to 1956.

25 Q While at Ever-Ready, what positions did you hold?

1     A   I started at Ever-Ready as an engineering assistant in our  
2     plant in Bennington, Vermont.  Later became head of the  
3     department in industrial engineering at another plant.  Had  
4     personnel experience for a couple of years in the personnel  
5     department of one of our factors.  I worked in the  
6     headquarters in New York City as a sales engineer.  Then  
7     later became product manager.  And just before I retired was  
8     sales development manager.

9     Q   Would you briefly describe your general responsibilities  
10    at these positions you held at Ever-Ready?

11    A   Okay.  The first eleven years I was in the production  
12    organization, and the industrial engineering jobs had to do  
13    with plant layout, method analysis, product costing, general  
14    efficiency work trying to make batteries and flashlights more  
15    effectively.  The personnel job was in a plant with about a  
16    thousand employees and was general personnel work that any  
17    large manufacturing operation has.  For nine years I was a  
18    sales engineer working with different manufacturers designing  
19    batteries for their devices or helping them design devices to  
20    fit a battery in, in different parts of the country.  Then  
21    for fourteen years I was the product manager.  About eight  
22    years with -- I mean with consumer flashlights and lanterns.  
23    About three years with the industrial flashlights and  
24    batteries.  And I was at other battery-type experience with  
25    hearing aid batteries.  Rechargeable nickel-cadmium

1 batteries. Different batteries that every manufacturer  
2 manufactures.

3 Q Now, specifically when were you a product manager?

4 A 1972 to 1978 I was product manager which included  
5 flashlights and from 1981 to 1986 I was product manager for  
6 industrial lighting products and industrial batteries as  
7 well.

8 Q Could you please be a little more specific with regard to  
9 the product<sup>s</sup> at Ever-Ready for which you had product  
10 management responsibilities?

11 A Okay. The different products we had were assigned to  
12 various product managers. As you can tell from this  
13 on-again, off-again type of thing, we tended to switch  
14 around. We worked as a team in trying to bring to market the  
15 different lithium, nicad, hearing aid, alkaline, carbon  
16 batteries, all the battery systems as well as the lighting  
17 products so that we would come to the public through our  
18 sales force and get into, say, a hardware store or drug store  
19 or food store with displays and with promotions and programs  
20 and products which would appeal to the public and which would  
21 therefore be good for our business and would compete with our  
22 various competitors like Duracell and Ray-O-Vac and all the  
23 other guys out there with the same sorts of products.

24 Q Now, as part of your product management responsibilities,  
25 did you work with flashlight designers?

1 A Yes, when I was product manager for lighting products, I  
2 worked with ~~and~~<sup>an</sup> outside design firm who did a lot of design  
3 work for us with flashlights. I worked with the in-house  
4 design loop in our factory in Saint Albans, Vermont. I  
5 worked with other people in the factory whenever we were  
6 coming out with a new lighting product or flashlight to get  
7 the various choices before all concerned to see what it look<sup>ed</sup><sub>ed</sub>  
8 like, see how well it worked, to see what the costs would be  
9 in trying to manufacturer it and trying to come to our top  
10 management with a series of choices that they might have to  
11 bring a flashlight into being, and this was part of the job  
12 of marketing our products.

13 Q Now, what specific involvement did you have with these  
14 flashlight design people?

15 A Well, as I said, I would visit the industrial design firm,  
16 and we would work out colors and sizes and shapes and  
17 functions that appeared attractive. I would go up to the  
18 production plant with some of these ideas and drawings and  
19 concepts and models to see what might happen. Then once we  
20 got an okay and said, hey, here's where we are going, then my  
21 job would be to help with the packaging design, the labeling  
22 and this type of operation so we would have something we  
23 could manufacture.

~~24 Q Now, based upon your experience in the flashlight industry,~~  
25 ~~do you have an~~<sup>any</sup> experience as to how and why consumers buy

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,

CA3-86-0427-G

Plaintiff,

VS.

J. BAXTER BRINKMANN  
INTERNATIONAL CORPORATION and  
THE BRINKMANN CORPORATION,

Defendants.

THE BRINKMANN CORPORATION,

Counter-claimant,

vs.

MAG INSTRUMENT, INC.,

Counter-defendant.

April 18, 1990

Volume 2  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury  
For the Plaintiff:

LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017

BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson and  
Mr. Allan Jansen

and

**COPY**

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

## P R O C E E D I N G S

THE COURT: Good morning, Ladies and Gentlemen.  
Thank you for being on time. Before we get started this  
morning, I have an announcement to make, and that is that one  
member of the jury, Mrs. Billie Harrison has been excused and

I believe when we recessed yesterday afternoon we still  
had Mr. Kelly testifying. Mr. Kelly, would you come back to  
the witness chair?

MR. WILLIAM KELLY

DIRECT EXAMINATION (Cont'd)

BY MR. JANSEN:

type of flashlight products that were on the market. Was  
there another type?

A Yes, there were. These would be the sealed-up disposable  
lights.

Q And did Ever-Ready make such a flashlight?

A Yes, we did.

Q Would you please describe Exhibit 2858?

A 2858 is a little Ever-Ready. We call it a squeeze light.  
You squeeze the thing, it turns on, and you let go and it  
turns off.

Q When was that introduced?

A This was introduced in 1986.

2 Q Are there materials other than plastic or metal that you  
3 have been discussing from which flashlights are made?

4 A Yes.

5 Q What other material?

6 A Machined aluminum.

7 Q Now, when did these machined aluminum flashlights make  
8 their entry into the market?

9 A Originally as far as we were aware about the early to  
10 middle seventies machined aluminum flashlights became  
11 available.

12 Q Now, did there come a time when companies in the  
13 flashlight industry made their small Double A or Triple A  
14 size flashlights out of materials other than this metal, this  
15 stamped metal or plastic?

16 A Yes, in the middle eighties.

17 Q What companies were those?

18 A The first is a Mini-Maglite that we were aware of in any  
19 volume hitting the marketplace.

20 Q What was the feeling at Ever-Ready about the Mini-Maglite  
21 flashlight?

22 A Well --

23 MR. CLARK: Objection, your Honor. The witness is  
24 not competent to testify about Ever-Ready opinion.

25 THE COURT: Overruled.



1 MR. CLARK: Also hearsay.

2 THE COURT: Overruled.

3 A In the marketing group at Ever-Ready where I worked we  
4 watched all of our competitors, and we watched the  
5 marketplace to see what was going on. And obviously we  
6 looked at new Ray-O-Vacs and new Duracell flashlights or  
7 batteries or what have you. When the Maglite hit the market  
8 we were quite impressed with the design, the way the light  
9 looked, and we could see it appearing in stores. After all  
10 when we call on a customer -- We call on a buyer who works  
11 for a drug chain, let's say, and we look to get our batteries  
12 and our flashlights out on his rack in his drug stores.  
13 Other products, competing products like the Ray-O-Vacs and  
14 the Duracell, show up on the same rack. So we're quite  
15 interested in getting our stuff out there and keeping our  
16 space on the rack and all of that kind of stuff, and we could  
17 see the Mini-Maglite come in and get space in the stores, and  
18 we were quite impressed with the product. We look upon this  
19 as a good thing for us as a battery manufacturer to have more  
20 kinds of flashlights out there. So we were quite impressed  
21 with it.

22 ~~BY MR. JANSEN:~~

23 Q Now, did Ever-Ready have a warranty department?

24 A Yes, we did. ~~Still do.~~

25 Q Did it ever occur at Ever-Ready that it received

ATTACHMENT H

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,

Plaintiff,

VS.

J. BAXTER BRINKMANN  
INTERNATIONAL CORPORATION and  
THE BRINKMANN CORPORATION,

Defendants.

THE BRINKMANN CORPORATION,

Counter-claimant,

vs.

MAG INSTRUMENT, INC.,

Counter-defendant.

CA3-86-0427-G

April 20, 1990

Volume 4

Transcript of Trial

Before the Honorable A. Joe Fish, and a jury

For the Plaintiff:

LYON & LYON

611 West Sixth Street, 34th Floor  
Los Angeles, California 90017

BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson and  
Mr. Jerrold B. Reilly

and

STRASBURGER & PRICE

901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202

BY: Mr. Robert K. Drummond

1 down, sir.

2 MR. DRUMMOND: Your Honor, I am going to call  
3 Professor Berry Katz if I can go get him.

4 (Witness sworn)

5 MR. BERRY KATZ

6 DIRECT EXAMINATION

7 BY MR. DRUMMOND:

8 Q Tell the Court and jury your full name and where you live.

9 A My name is Berry Katz. I live in Palo Alto, California.

10 Q And what is your occupation?

11 A I am on the faculty at Stanford University.

12 Q How long have you been at Stanford University?

13 A Eleven years.

14 Q What department are you associated with at Stanford?

15 A I'm a Senior Lecturer in the Design Division of the  
16 Department of Mechanical Engineering.

17 Q Are you an engineer as such?

18 A No, I'm actually a disoriented philosopher by training.

19 Q Would you tell the jury what an historian and philosopher  
20 does and how you got in that area?

21 A I'm in a specialized group in the engineering school which  
22 is attempting to design an integrated curriculum for  
23 professionally oriented design students that would give them  
24 a technical as well as a kind of cultural and social training  
25 in the design skills that they will need.

~~hand pretty much, did we not?~~

2       A   Yes, and as we entered the period of industrial mass  
3       production it became necessary to think about what things  
4       should look like. Does a table radio have to look like a  
5       Greek temple and should it look like a table radio, and if  
6       so, what is that. And one of the most important doctrines  
7       that emerged was the idea that the way a thing looks should  
8       be determined by the function that the thing performs. So in  
9       a period when a machine aesthetic was struggling for  
10      acceptance, that was a very important notion, but that battle  
11      was won forty or fifty years ago.

12     Q   Back years ago I recall there being a blacksmith in my  
13      home town. They didn't care much what anything looked like.  
14      Is that what you are seeking to overcome?

15     A   Very much. To give professional design students a sense  
16      of the infinite range of options opened up to them and also  
17      to give liberal art students the ability to critically  
18      evaluate things they see in their own world.

19     Q   Well, in teaching them to evaluate things do you give them  
20      assignments?

21     A   Oh, yeah, we have a range of practical assignments that we  
22      give them in addition to writing. One of the more important  
23      ones that we have done is to ask students to go out in the  
24      world and identify an industrially mass produced object that  
25      they believe is a high aesthetic quality.

1 Q When you say aesthetic quality, what do you mean?

2 A Well, by that we mean in addition to the thing doing what  
3 it's supposed to do it can also be a thing of beauty. It can  
4 be a thing that displays high imagination, high creativity  
5 and of course a real distinctiveness.

6 Q After they take this project, then what do they do as far  
7 as class discussion of these things?

8 A Well, if it's something smaller than a bridge, they'll  
9 bring it in and there will be class discussion of individual  
10 single objects, and they are expected to write essays in  
11 which they justify their selection in terms of the concepts  
12 and categories that we have given them in reading and  
13 lectures.

14 Q Are you familiar with the Mini-Maglite, Professor Katz?

15 A Yes, I am.

16 Q Would you explain to the jury how you happen to become  
17 familiar with that?

18 A A couple of years ago I remarked that in response to this  
19 assignment a surprising number of students all brought the --

20 MR. WEIR: Objection, your Honor. This is hearsay.  
21 He's going to testify if I understand the foundation that's  
22 been laid that his students are going to state their belief.  
23 He's going to be saying that the student told me this is my  
24 belief, and it's being asserted for the truth of the matter  
25 that the student actually believed it.

1 THE COURT: You want to reply to that, Mr.  
2 Drummond?

3 MR. DRUMMOND: Your Honor, I am going into the  
4 factual aspects of what he has done in teaching his course.

5 THE COURT: Overrule the objection.

6 BY MR. DRUMMOND:

7 Q Go ahead with your answer about what the student did in  
8 response.

9 A I remarked that out of a class of generally very  
10 sophisticated undergraduates and graduates a surprising  
11 number of them selected the Mag Mini light as an object that  
12 they felt not only worked well and was socially responsible  
13 but also exhibited exceptional distinctiveness and high  
14 aesthetic quality.

15 Q Well, would you tell the jury what values you are trying  
16 to convey to these kids to consider when they go out and look  
17 for such an object, that they brought back a Mini-Maglite?

18 A Well, we assume that they have gotten from their  
19 engineering courses criteria to study efficiency in technical  
20 terms. So we're trying to get them to think about things  
21 such as creativity, elegance, imagination, sophistication,  
22 beauty, criteria such as that.

23 Q What does that have to do with the flashlight?

24 A Well, in the case of a flashlight, it would be easy to  
25 imagine two instruments that performed equally well, perhaps

1 cost the same amount of money, but one of them is simply a  
2 humdrum object and the other was a think of beauty that you  
3 really wanted to pick up to touch and explore how it worked  
4 and perhaps to own.

5 Q Was it your objective in sending these kids out to find a  
6 product that had the best performance, functional  
7 performance?

8 A No. We assumed that they are thinking about that, but  
9 that's not the objective of our course.

10 Q In your course, are these kids actually asked to design  
11 products?

12 A No, not in this course but as part of the product design  
13 major, that's a major activity that they have.

14 Q Are you involved in any way in that process?

15 A Yes, I do some coaching and counselling along the way, but  
16 mostly I'm involved in evaluating as part of the faculty jury  
17 the finished products at the end of the jury.

18 Q This would be a course of more advanced design, but even  
19 though you are not an engineer, you are asked to come in and  
20 evaluate the object that the kid or the student, I should  
21 say, has designed in the process?

22 A Yes, that's when we examine them and challenge them to  
23 give their rationale and ask questions about the details.

24 ~~MR. DRUMMOND: Approach the witness, Judge?~~

25 ~~THE COURT: Yes, sir.~~



ATTACHMENT I

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,	)	CA3-86-0427-G
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
J. BAXTER BRINKMANN	)	
INTERNATIONAL CORPORATION and	)	
THE BRINKMANN CORPORATION,	)	
	)	
Defendants.	)	
<hr/>		
THE BRINKMANN CORPORATION,	)	
	)	
Counter-claimant,	)	
	)	
vs.	)	
	)	
MAG INSTRUMENT, INC.,	)	
	)	
Counter-defendant.	)	
<hr/>		
	)	May 1, 1990

Volume 11  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff: LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson,  
Mr. Jerrold B. Reilly and  
Mr. Allen Jansen

and

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

1 being associated with Mag Instrument or Brinkmann or anybody  
2 else?

3 A I'm not -- confused with what, Mr. Clark. What do you  
4 mean by confused?

5 Q Well, do you know whether any consumers would confuse  
6 either of those prototypes with the Mini-Maglite flashlight?

7 A I really can't say. I wouldn't be confused by it, but I  
8 can't say what the average ordinary consumer would be.

9 MR. CLARK: No further questions, your Honor.

10 THE COURT: May we excuse Dr. Watson?

11 MR. ANDERSON: Yes, your Honor.

12 THE COURT: Dr. Watson, you may be excused. Thank  
13 you.

14 THE WITNESS: Thank you, Judge.

15 THE COURT: Who's the plaintiff's next witness?

16 MR. ANDERSON: Your Honor, plaintiff's next witness

18 MR. JACK MILLER

19 DIRECT EXAMINATION

20 BY MR. ANDERSON:

21 Q Please state your full name for the record.

22 A Jack Miller.

23 Q Where do you live?

24 A I live in Sierra Madre, California.

25 Q What do you do for a living?

1 A I operate my own business, Design Technology Corporation.

2 Q What's your educational background, Mr. Miller?

3 A I have a four year degree, major in military science.

4 Q Okay. Now, were you in the Air Force for a period of  
5 time?

6 A Yes, I was.

7 Q What did you do in the Air Force?

8 A I was a multi-engine pilot.

9 Q Did you see any active duty?

10 A Yes, sir, I served in the Korean War.

11 Q How many active duty flights did you have?

12 A I had seventy-five combat missions.

13 Q Did you receive any medals?

14 A Yes, sir. Three air medals and the Distinguished Flying  
15 Cross.

16 Q Okay. What did you do after you left the Air Force?

17 A After I left the Air Force I went to work as a design  
18 engineer for the Jet Propulsion Laboratories of the  
19 California Institute of Technology.

20 Q What did they do there?

21 A At that time it was entirely guided missile and space  
22 vehicle development.

23 Q While you were there, were you promoted?

24 A Yes, sir. I was promoted to Engineering Group Supervisor  
25 at the age of twenty-six.

1 Q Were you the youngest supervisor for Jet Propulsion?

2 A Youngest in the history of the laboratory, yes.

3 Q What were your responsibilities as supervisor?

4 A Well, my group was the Guidance and Control Design Group.

5 So I had responsibility for all the guidance components  
6 systems, optical systems, anything relating to guiding or  
7 aiming a missile or satellite, spacecraft.

8 Q Let me speed this up a little bit and read some of your  
9 history. After Jet Propulsion Lab, I believe you left in  
10 1960; is that right?

11 A Yes.

12 Q After that you went to the Engineering Department and were  
13 manager of Electro-Optical Systems in Pasadena, California,  
14 which is a subsidiary of Xerox, where you were responsible  
15 for the Stress and Thermal Analysis Department and various  
16 other things, and there you participated in high altitude  
17 hydrogen bomb testing in the South Pacific. Is that right?

18 A That's correct.

19 Q Now, what type of projects did you work on there other  
20 than the hydrogen bomb?

21 A Okay. I was responsible for simply being sure that  
22 twenty-seven rockets which are three- and four-stage rockets  
23 and their hundred thirty-five ton pay loads all were launched  
24 properly and that they made their proper measurements through  
25 the bomb burst cloud, and I also designed the primary

1 scientific instrument which is a gamma ray scanner to map the  
2 cloud.

3 Q What was the result of that testing? What happened?

4 A Well, the test measurements were far more extensive than  
5 anticipated, and as a result of some of those tests anyway  
6 atmospheric testing was stopped.

7 Q Atmospheric testing?

8 A Yes.

9 Q And now after that you went and became Division Manager  
10 Commercial Space Corporation in Almonte, California, where  
11 you managed the Engineering Division of a hundred engineers  
12 and scientists; is that correct?

13 A That's correct.

14 Q And there you worked on high tech applications including  
15 propulsion guidance systems.

16 A Yes, sir.

17 Q And then after that you became president of Mentis  
18 Corporation in San Gabriel, California, which does R and D  
19 and was a subsidiary of Whamo?

20 A A whole lot more fun, yes, sir. Manufacturers of the  
21 Frisbee.

22 Q You made toys there, right?

23 A Yes, sir.

24 Q When did you start to work on lighting products?

25 A Shortly thereafter. I served both as a consultant and

1 then -- Well, I designed some lighting products there at  
2 Whamo including camp lanterns and some police department  
3 lights.

4 Q Okay. Did you go into business for yourself?

5 A Yes, I did consulting for several years.

6 Q And then after that you became Vice President of Research  
7 and Engineering of Sunbeam Lighting Company in Los Angeles,  
8 California?

9 A That's correct. Also had a plant in the Chicago area.

10 Q Okay. Did you work on any lighting products there?

11 A Yes, sir. We manufactured lighting products much like the  
12 ones in this building as well as medical lighting products.

13 Q You mean florescent lights?

14 A Yes, sir.

15 Q Okay.

16 A They may well be Sunbeam lights. I don't know.

17 Q Then after that you became President of Acroform  
18 Corporation which is a Los Angeles manufacturer of stamped  
19 metal products; is that correct?

20 A Yes, I was asked to take over the company and turn it  
21 around. We had forty presses for up to four hundred tons and  
22 made parts for General Motors.

23 Q While there did your work involve any design or tooling of  
24 plants?

25 A Yes, sir, I was directly responsible for the tooling

1 design and making parts.

2 Q And then after that you started your company you still  
3 work for today, Design Technology Corporation; is that right?

4 A That's correct.

5 Q What does your company do?

6 A We make our business entirely from the invention and  
7 development of new products.

8 Q What type of new products have you developed briefly?

9 A I have automotive products, health products, lighting  
10 products, exercise devices, scientific instruments.

11 Q How many United States Patents do you have?

12 A I'm not quite sure. Somewhere between seventy-five and  
13 eighty.

14 Q What types of products have you patented?

15 A Well, I have thirty patents in lighting and optics. I  
16 have several in military equipment. I have about fifteen in  
17 health and exercise products. I loose track after a while.  
18 Several in toys. Several in flashlights.

19 Q All right. Now, when did you first begin working with  
20 machined aluminum flashlights?

21 A Practically as soon as I started design technology. So  
22 it's been thirteen, fourteen years ago.

23 Q What company did you do consulting work for?

24 A The first company I consulted for was Bianchi Leather  
25 Products.



1 A Substantially so, yes, sir.

2 Q Now, what bearing, if any, did that declaration have on  
3 the Mini-Maglite flashlight?

4 A None that I can see.

5 Q Why?

6 A The two designs are just not related that closely.

7 Q Did Mr. Brinkmann ever call you or anyone from Brinkmann  
8 ever call you and ask you if your declaration was meant to  
9 refer to the Mini-Maglite flashlights?

10 A No.

11 Q Now, when were you first asked to be an expert in this  
12 case?

13 A Approximately three and a half four years ago.

14 Q What product were you asked to be an expert on?

15 A The Mini-Maglite.

16 Q Well, did you see any problem in being an expert on that  
17 in view of this declaration?

~~18 A No, they are two entirely different products.~~

19 Q Now, if you can recall, why don't you describe the  
20 circumstances under which you first saw the Mini-Maglite  
21 flashlight?

22 A Okay. As a preamble, I have two sons who are policemen  
23 and have been for several years and my younger son Mark,  
24 knowing that I was interested in flashlights, approached me  
25 one day and he said, Dad, have you seen the Mini-Maglite, and

1 I said No, I don't know what it is, and he said, You ought to  
2 look at it. And so I went to a local police supply -- he  
3 said it was awfully expensive on a beginning policeman's  
4 salary. Probably so. So I went to the local police supply  
5 which was I believe Chesner and Perez in Perovia, and I saw  
6 them there, and I bought three of them.

7 Q What did you do with them?

8 A I gave one to each of my policemen sons, and the other one  
9 I kept and immediately took it apart to see how it was made.

10 Q What was your opinion?

11 A I was impressed. It's a beautifully made product, and I  
12 thought so at the time and still do.

13 Q How did you think the overall shape, style and appearance  
14 of the Mini-Maglite flashlight compared to the flashlights  
15 that existed previously of which you were aware?

16 A I said before I thought it was a totally unique design.

17 Q Why?

18 A It had a unique appearance, different proportions. It's  
19 just a beautiful little product.

20 Q Are you an art collector?

21 A Yes, I am. Have quite a good art collection.

22 Q Did you consider the Mini-Maglite flashlight to be a work  
23 of art?

24 A I still do. It's beautiful.

~~Q Now, having seen the Mini-Maglite flashlight, the one~~

ATTACHMENT J

IN THE UNITED STATES DISTRICT COURT  
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DALLAS DIVISION

MAG INSTRUMENT, INC., ) CA3-86-0427-G  
Plaintiff, )  
VS. )

J. BAXTER BRINKMANN )  
INTERNATIONAL CORPORATION and )  
THE BRINKMANN CORPORATION, )  
Defendants. )

THE BRINKMANN CORPORATION, )  
Counter-claimant, )

vs. )

MAG INSTRUMENT, INC., )  
Counter-defendant. )

May 11, 1990

Volume 16  
Transcript of Trial  
Before the Honorable A. Joe Fish, and a jury

For the Plaintiff:

LYON & LYON  
611 West Sixth Street, 34th Floor  
Los Angeles, California 90017  
BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson,  
Mr. Jerrold B. Reilly and  
Mr. Allen Jansen

and

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

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VOLUME 16

CASSIDI L. CASEY, CSR, RPR (214) 767-0774

1 MR. MARTIN SIEGEL

2 DIRECT EXAMINATION

3 BY MR. ANDERSON:

4 Q Mr. Siegel, where do you live?

5 A Los Angeles, California.

6 MR. PHELAN: Your Honor, if they are through with  
7 that board, the jury might not like to see me, but I do watch  
8 them. Can we get it down?

9 THE COURT: Yes, sir.

10 BY MR. ANDERSON:

11 Q What do you do for a living, Mr. Siegel?

12 A I'm a consulting engineer, mechanical and metallurgical.

13 Q Did you used to be a professor?

14 A Yes, I was Professor of Cechanical Engineering at the  
15 University of Southern California for thirty-five years.

16 Q What's your educational background?

17 A I have a bachelor degree in mechanical engineering and a  
18 master of science degree in metallurgical engineering, and I  
19 have had other graduate work in applied mechanics and  
20 material and manufacturing processes.

21 Q Have you ever taught any courses in machine design?

22 A Yes.

23 Q Courses concerning manufacturing methods or processes?

24 A Yes, for all those thirty years.

25 Q Have you taught courses concerning the cost of

VOLUME 16

CASSIDI L. CASEY, CSR, RPR (214) 767-0774

1 manufacturing?

2 A Yes.

3 Q Have you ever authored any publication concerning  
4 mechanical design?

5 A Yes.

6 Q And you been retained as a consultant regarding  
7 manufacturing products from aluminum; is that right?

8 A Yes, I have.

9 Q I believe you were a consultant and for Lemlar  
10 Manufacturing Corporation where you made sun control  
11 equipment. You consulted on lathes, milk machines, drill  
12 presses, punch presses, products including machine aluminum  
13 parts, and you consulted with the company on the machining of  
14 those parts; is that right?

15 A Yes.

16 Q You also consulted for Ladwig Valve Company which made  
17 valves for machined aluminum, and you consulted with them  
18 concerning machining of valve parts and helped them develop a  
19 line of valves that were competitive with other products, and  
20 you also were involved in the costing and manufacturing  
21 processes. Is that correct?

22 A That's correct.

23 Q Again, you have been a consultant for Northrop Aircraft  
24 where you consulted on the feasibility and economic  
25 approaches of making a number of small component parts, and

1 that involved lathes, mills and drilling and manufactured  
2 those out of aluminum. Is that correct?

3 A Yes.

4 MR. ANDERSON: Your Honor, at this we request that  
5 Mr. Siegel be recognized as an expert in mechanical design  
6 manufacturing methods and costs.

7 THE COURT: Any objection?

8 MR. CLARK: No objection.

9 THE COURT: The Court will recognize Mr. Siegel as  
10 an expert in those areas with the usual admonitions to the  
11 jury as to the effect of that recognition.

12 BY MR. ANDERSON:

13 ~~Q Mr. Siegel, in preparing to testify, have you visited Mag-~~  
14 Instrument's facilities, spoken with Mr. Maglica, studied the  
15 Mini-Maglite flashlight, the Brinkmann Black Max flashlight,  
16 reviewed computer analyses concerning costs of the various  
17 aluminum parts for the Mini-Maglite and in fact looked at the  
18 sequence of machining of those parts?

19 A I did and I have.

20 Q And in the past you have done an analysis where you went  
21 through the cost of the Mini-Maglite and compared certain  
22 changes that were made to the Mini-Maglite to see how those  
23 affected the cost; is that right?

24 A That's correct.

25 Q Now, have you had a chance to evaluate Mr. Mauro's

1 Q What is your opinion?

2 A It can be.

3 Q Generally speaking, without a whole lot of details in what  
4 ways?

5 A Well, reducing size or thickness or things of that kind

~~6 the price would go down and yet the function wouldn't change~~

7 Q Do you have an opinion as to whether or not a small  
8 aluminum flashlight would have to be made by using machining  
9 as opposed to some other manufacturing processes?

10 A Well, other processes than machining could be used.  
11 Extrusion. Impact forming, die casting. There are many  
12 other techniques that can be used to make parts.

13 Q How would those techniques affect the cost?

14 A Some might be more expensive, some might be less  
15 expensive.

16 Q Can you give you an example of some that would be less  
17 expensive?

18 A Some parts could be extruded or formed on an impact  
19 loading type device and would go down five or ten percent in  
20 price.

21 Q How would that affect the quality of those parts if at  
22 all?

23 A Well, if done appropriately it wouldn't affect the  
24 quality.

25 Q What was your impression of the shape style and overall



1 appearance of the Mini-Maglite flashlight when you first saw  
2 it?

3 A It's a unique and unusual shape.

4 Q Why did you think that?

5 A Because of a combination of the curvature of the head and  
6 the cylinder that meets on the knurling. It's a memorable,  
7 unusual shape.

8 Q Do you have an opinion as to whether or not the  
9 Mini-Maglite flashlight is superior or optimal in terms of  
10 ease of manufacture or manufacturing costs?

11 A Yes, I do.

12 Q What is your opinion?

13 A I don't think it's optimal or minimal in cost of product.

14 Q Why?

15 A I think there are other techniques that could be applied  
16 that could reduce cost, the change of shape, thickness and so  
17 on. It could reduce the cost.

18 Q Do you have an opinion as to whether or not the  
19 Mini-Maglite flashlight is one of a limited number of equally  
20 efficient designs in terms of manufacturing ease or  
21 manufacturing costs?

22 A Well, it's not one of a limited number. There are a very  
23 large number of variations that could be made to the  
24 flashlight so that it's not a limited number, but there are  
25 many, many variations possible.

1 Q Would you say there is a substantial number?

2 A Yes.

3 Q What is your opinion as to whether or not the Brinkmann  
4 Black Max flashlight is a copy of the Mini-Maglite?

5 A It's an exact copy. It's an exact duplicate.

6 Q Do you have any doubt about that?

7 A No. The parts are interchangeable. I can identify taking  
8 manufacturing tolerance into account. Of individual parts  
9 they would exchange and measure, one wouldn't know whether it  
10 was Brinkmann or Mini-Mag.

11 Q What is your opinion as to whether or not Brinkmann would  
12 somehow be at a competitive disadvantage in terms of ease of  
13 manufacture or manufacturing costs if it could not copy the  
14 Mini-Maglite flashlight?

15 A It wouldn't be at a disadvantage. It might have the  
16 advantage if they chose a more optimal shape from a machined  
17 point of view.

18 Q Now, have you read some of the testimony about the  
19 Mini-Maglite flashlight just being a circle on a cylinder?

20 A Yes, I have.

21 Q Do you have an opinion about that testimony?

22 A Well, it's not just a circle. It's an assemblage of  
23 shapes in the same way that I think Picasso's painting using  
24 blue paint would be dissimilar to other paintings using  
25 similar sorts of shapes. But it's unique in that using the

1 shapes that are available in nature and available to us, it  
2 has a unique combination including of course the knurling  
3 pattern and the curvature and so on. But it's not just a  
4 radius meeting a cylinder or anything like that. It may be  
5 that, but the uniqueness of it for whatever reason  
6 aesthetically and so forth gives an impression that's very  
7 unique. Those parameters would change the appearance and  
8 make it look different, and people are like that. All of our  
9 faces are pretty much the same but with small combinations of  
10 radiuses of noses, cheekbones and whatever. A small  
11 variation makes everyone a distinctive person to look at and  
12 to remember and identify.

13 MR. ANDERSON: Pass the witness, your Honor.

14 THE COURT: Cross examination?

15 MR. CLARK: Yes, your Honor.

16 CROSS EXAMINATION

17 BY MR. CLARK:

18 Q Dr. Siegel, are you telling this jury that the  
19 Mini-Maglite is like a Picasso painting?

20 A No, it's a flashlight, and I know what a Picasso painting  
21 looks like. I said small evaluations make distinctive  
22 differences in the overall pattern.

23 ~~Q All right. Have you based your test analysis on your test~~  
24 of Mr. Maglica's plant?

25 ~~I~~ Not that alone. I was at Mr. Maglica's plant, but I

ATTACHMENT K

Watson

1

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

MAG INSTRUMENT, INC.,

CA3-86-0427-G

Plaintiff,

VS.

J. BAXTER BRINKMANN  
INTERNATIONAL CORPORATION and  
THE BRINKMANN CORPORATION,

Defendants.

THE BRINKMANN CORPORATION,

Counter-claimant,

vs.

MAG INSTRUMENT, INC.,

Counter-defendant.

May 1, 1990

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BY: Mr. Robert C. Weiss,  
Mr. Roy Anderson,  
Mr. Jerrold B. Reilly and  
Mr. Allen Jansen

and

STRASBURGER & PRICE  
901 Main Street, Suite 4300  
Post Office Box 50100  
Dallas, Texas 75202  
BY: Mr. Robert K. Drummond

1 Q Mr. Drummond did that, it was working fine. Mr. Jackson  
2 isn't it in your interest to say that every flashlight you  
3 can see is a copy and ought not to be allowed to be sold?  
4 Isn't that in your economic interest, every one but a  
5 Mini-Maglite?

6 A I would imagine you have the same feeling for other  
7 lawyers.

8 Q Yes, sir. You are right.

9 MR. PHELAN: Pass the witness.

10 THE COURT: Redirect?

11 MR. PHELAN: At least there is a couple I'd like to  
12 get rid of.

13 MR. JANSEN: No questions, your Honor.

14 THE COURT: May we excuse Mr. Jackson? Mr.  
15 Jackson, you maybe excused. Thank you.

16 Who's the plaintiff's next witness?

17 MR. PHELAN: Dr. Hal Watson, your Honor.

18 DR. HAL WATSON

19 DIRECT EXAMINATION

20 BY MR. ANDERSON:

21 Q What is your name?

22 A Hal Watson Junior.

23 Q Where do you live?

24 A I live here in Dallas.

25 Q What do you do for a living, Mr. Watson?

1 A I'm a Professor of Mechanical Engineering at SMU and  
2 president of my own company, Watson Engineering Company which  
3 is a consulting engineering company.

4 Q Are you a professional engineer registered in the State of  
5 Texas?

6 A Yes, sir, I am.

7 Q What's your educational background?

8 A Well, I graduated from high school over in East Texas in  
9 Henderson in 1958. And I went from there to Columbia  
10 University in New York from 1958 to 1962, got my bachelor's  
11 degree with a concentration in mechanical engineering and  
12 then in 1962 came back to Texas. I had had enough of cold  
13 weather and fast-talking people, and I went to the University  
14 of Texas in 1962 and was there until 1967. I got my master  
15 of science degree in engineering mechanics in 1965 and in  
16 1967 got my Ph.D. in engineering mechanics which is a branch  
17 of mechanical engineering, and that pretty much sums it up.  
18 I have had a few short courses here and there, but they are  
19 not of any significance compared to the rest of it.

20 Q When did you begin teaching at SMU?

21 A At SMU in 1967. I previously taught at the University of  
22 Texas.

23 Q Have you taught at SMU since 1967?

24 A Yes, sir, except for one stretch I spent in South America  
25 for nine months teaching a couple of laboratory courses at

1 the Federal University at Porto Labia (phonetic) Brazil and  
2 the National University at Tucuman (phonetic) Argentina.

3 Q What courses have you taught at SMU?

4 A I have taught almost all the courses in the engineering  
5 department relating to mechanical design. I have excluded  
6 courses involving heat and power. I don't get involved with  
7 thermal dynamics and heat transfer. I get involved with  
8 structural analysis, mechanical design, computer-aided  
9 design, computer-aided robotics, computer-aided  
10 manufacturing, that sort of thing.

11 Q Now, I believe you have designed several mechanical  
12 products yourself, correct?

13 A Yes.

14 Q Let me go through a few of them. A split-rim for  
15 foam-filled high pressure tires used on an overhead monorail  
16 power mover?

17 A A wheel. Yes, that was a people mover.

18 Q You also designed an electromechanical intervalometer for  
19 helicopter rocket launchers?

20 A Yes, it's a timing device to shoot rockets from  
21 helicopters.

22 Q And for H.R. Reid Associates you designed a  
23 vacuum-controlled PVC valve for air pollution control systems  
24 for automobiles that was patented?

25 A That's right.



1 Q Okay. Now, you also designed a downhole drilling turbine  
2 for an oil field operation?

3 A Yes, sir.

4 Q And you have designed a disc brake system for heavy trucks  
5 and trailers?

6 A Yes, low boy trailers, the kind that carry very tall  
7 objects, the braking system on them is not too good. So the  
8 disc braking system was an improvement.

9 Q And you been a consultant for a number of companies  
10 including Dresser?

11 A Dresser Industries here in Dallas.

12 Q And a variety of other companies, too?

13 A Yes, sir.

14 Q Now, you have received a few grants and contracts, too?

15 A Yes, sir.

16 Q And you have received a few awards including the  
17 outstanding professor at SMU 1983 or one of ten of them?

18 A Yes, sir.

19 Q And the most popular professor of mechanical engineering  
20 department from 1985 to 1986; is that right?

21 A Yes, sir.

22 Q Do you teach engineering design?

23 A I'm currently teaching engineering design, yes, sir.

24 Q Do you teach an engineering drawing course?

25 A Computer aided design, CAD, C-A-D.

IN THE UNITED STATES DISTRICT COURT  
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DALLAS DIVISION

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**COPY**

VOLUME 16

CASSIDI L. CASEY, CSR, RPR (214) 767-0774

1 didn't base it on that journey.

2 Q Do you know how many-flashlights Mr. Maglica has made?

3 A No, I don't.

4 Q He has made in excess of twenty million flashlights.  
5 What's two cents times twenty million?

6 A I believe it's about four hundred thousand dollars or  
7 forty thousand dollars. I would have to calculate more  
8 carefully. I think it's four hundred thousand.

9 Q What's eight cents times twenty million?

10 A Four times that.

11 Q A million six?

12 A Million six.

13 MR. CLARK: No further questions.

14 THE COURT: Redirect?

15 MR. ANDERSON: No, your Honor.

16 THE COURT: Mr. Siegel, you may step down. Thank  
17 you. Who's the plaintiff's next witness in rebuttal?

18 MR. ANDERSON: Your Honor, our next witness is Hal

19 Watson.

20 DR. HAL WATSON

21 DIRECT EXAMINATION

22 BY MR. ANDERSON:

23 Q Now, as a mechanical engineer, approach a question

24 product design, Dr. Watson?

25 A Well, most of the time mechanical engineers don't work

1 is, it is made good and reflects properly -- one a little bit  
2 larger or smaller is not going to affect the light output  
3 very much. The light output really has to do with the number  
4 of batteries, the voltage and bulbing. All the reflector  
5 does is focus the engineering. Doesn't create it. Just can

7 Q Do you remember when you first saw a Mini-Maglite  
8 flashlight?

9 A Yes.

10 Q What was your opinion of the appearance of that flashlight  
11 when you first saw it?

12 A Well, I liked the appearance. I thought it was very clean  
13 and simple and elegant and unique. As an engineer I was of  
14 course interested in how it worked. You know, I like how  
15 things work. But the fact that it looked good and worked  
16 well, both of those are very important to me.

17 Q Why do you say that you thought it was unique in  
18 appearance?

19 A I had never seen anything like it as far as a small  
20 flashlight. Now, I like small flashlights. Well, like when  
21 I work on my car, tinkering, I like to have both hands free,  
22 and I would use any number of those penlight flashlights  
23 prior to these small flashlights coming along,  
24 mini-flashlights, and hold the flashlight in my mouth while I  
25 worked with my hands, but the old ones didn't focus well and

1 they weren't rugged. This one was -- It had all the  
2 functions I liked and it looked good.

3 Q Do you have an opinion as to whether or not Brinkmann has  
4 to sell a flashlight that looks like the Mini Maglite to  
5 compete fairly with Mag?

6 A Oh, in my mind they would not have to sell a flashlight  
7 that looked like the Mini-Maglite in order to be competitive.

8 Q Why?

9 A There are so many other variations that I think people  
10 would like. I mean diversity is the spice of life.

11 Q Why do you think their flashlight looks the way it does?

12 A It's a copy.

13 ~~MR. ANDERSON: Now, your Honor, may I approach the~~

14 witness with Exhibit 3718?

15 THE COURT: Yes, sir.

16 BY MR. ANDERSON:

17 Q Dr. Watson, when you were testifying before, remember Mr.  
18 Clark asked you to look at Mr. Miller's scale-down of the  
19 flashlight, and you wanted to know about the O-ring and  
20 whether it would come unsealed if the thing was removed?  
21 Have you examined this prototype?

22 A Yes.

23 Q And does the O-ring become exposed in operation?

24 A Yes. It actually has more travel. This light has more  
25 travel than the Mini-Maglite and the Black Max. And there is

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